86-522

No. 86-

FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September 29, 1986

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QUESTIONS PRESENTED

The Court of Appeals has rendered a decision which is in direct conflict with decisions of other Courts of Appeals as to the question presented. That question is whether the Court of Appeals has issued a decision which is contrary to the fundamental principles of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*, by holding that the Federal Energy Regulatory Commission ("FERC" or "Commission") may *retroactively* modify a tariff provision which the natural gas pipeline company, Colorado Interstate Gas Company ("CIG"), did not propose to change and which the Commission previously approved.

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Colorado Interstate Gas Company.*

The parties below were: ANR Pipeline Company; Champlin Petroleum Company; Citizens Utilities Company; City of Colorado Springs; City and County of Denver; City of Fort Morgan; Colorado Interstate Gas Company; Colorado Public Service Commission; Columbia Gas Transmission Corporation; Federal Energy Regulatory Commission; Greely Gas Company; Kansas-Nebreska Natural Gas Company; MAPCO, Inc.; MIGC, Inc.; Mountain Fuel Supply Company; Natural Gas Pipeline Company of America; Northwest Central Pipeline Corporation; Panhandle Eastern Pipe Line Company; Peoples Energy Corporation; Peoples Natural Gas Company, Division of InterNorth, Incorporated; Public Service Company of Colorado; State of Colorado; State of Texas; State of Wyoming; The People's Gas Light and Coke Company, and North Shore Gas Company; United Gas Pipe Line Company; and Western Gas Supply Company and Cheyenne Light; Fuel & Power Company.

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* The following is a list of any parent, and affiliates of Colorado Interstate Gas Company and subsidiaries which are not wholly owned:

Coastal Corporation
ANR Pipeline Company
Numericom, Inc.

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IN THE

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OCTOBER TERM 1986

No. ————

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Colorado Interstate Gas Company ("CIG") petitions for a writ of certiorari to review the May 19, 1986 decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision for the United States Court of Appeals for the Tenth Circuit (App A.) is reported at 791 F.2d 803 (10th Cir. 1986). The order denying rehearing and rehearing *en banc* (App. B) is not reported.

The orders of the Federal Energy Regulatory Commission (App. C) are reported as follows:

Colorado Interstate Gas Company, "Order Affirming Initial Decision in Part and Reversing Initial Decision in

Part," 27 F.E.R.C. (CCH) ¶ 61,315 (May 25, 1984), and *Colorado Interstate Gas Company*, "Order Denying Rehearing," 28 F.E.R.C. (CCH) ¶ 61,083 (July 23, 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1986. The order denying the petition for rehearing and suggestion for rehearing *en banc* was entered on July 2, 1986.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statute upon which the Court of Appeals' decision is based is the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*, the relevant excerpts of which appear in Appendix D.

STATEMENT OF FACTS

The Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*, gives the Federal Energy Regulatory Commission ("Commission" or "FERC") the power, *inter alia*, to regulate the rates of interstate natural gas pipeline companies. Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c and d, prescribe the manner in which regulation is to be accomplished. Pursuant to Section 4 of the NGA, 15 U.S.C. § 717c, the Commission is authorized to suspend, for up to five months, any changes which a natural gas company proposes to make in its existing tariff, but if the suspension ends before a decision is rendered, the Commission may require the company to refund any amounts which are subsequently determined to be unjust and unreasonable. This Court has made it clear that it is a "pipeline's tariff *amendments*" which are subject to the Commission's suspension and refund authority under Section 4. *See, FPC* v. *Louisiana Power & Light Company*, 406 U.S. 621, 645 (1972) (emphasis added). In

contrast, Section 5 of the NGA, 15 U.S.C. § 717d, authorizes the Commission to review existing tariff provisions and to determine the appropriate tariff provisions "to be *thereafter* observed" by the company. 15 U.S.C. § 717d(a) (emphasis added). This Court has also recognized that any change which is made pursuant to Section 5 must be implemented on a prospective basis, from the date the Commission's order becomes effective. *Atlantic Refining Co.* v. *Public Service Commission of N.Y.*, 360 U.S. 378, 389 (1959); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

With the foregoing as the statutory background, in March, 1982, CIG filed a general rate increase filing with the Commission pursuant to Section 4 of the NGA. CIG proposed increased rate levels, but did not propose to change most of the previously Commission-approved provisions of its tariff. One such tariff previously approved provision which CIG did not propose to change or modify was a "minimum bill provision" in a tariff (contract) with Natural Gas Pipeline Company of America ("Natural"). Such minimum bill provision required Natural to pay for 90% of the volume of gas which it is contractually entitled to purchase. This specific minimum bill provision had been in effect since the fall of 1980 (and variants thereof, for twenty-five years prior thereto).[1] Pursuant to its Section 4 authority, the Commission suspended CIG's rate increase filing and did not permit such filing to become effective until September 29, 1982. However, the unchanged portions of CIG's tariff continued in effect during the five month suspension period, including the subject minimum bill provision. When it later issued its final order on May 25,

[1] As recently as June 24, 1982, almost three months *after* the rate filing at issue in this proceeding was filed, the Commission reviewed a certificate filing by CIG which included the very minimum bill provision at issue herein and issued the requested certificate without modifying this provision. *Colorado Interstate Gas Co.*, 19 F.E.R.C. (CCH) ¶ 61,283 (1982).

1984, the Commission ordered CIG to eliminate the minimum bill provision, *retroactive* to the end of the suspension period.

The Court of Appeals below recognized that CIG's rate increase filing "neither altered nor mentioned the minimum bill provision in the service agreement between Natural and CIG." *Colorado Interstate Gas Co.* v. *FERC*, 791 F.2d 803, 805 (10th Cir. 1986); App. A at 2a-3a. Nevertheless, the Court affirmed the Commission order which *retroactively* changed this minimum bill provision.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The issue posed here is a matter of interpretation of a federal statute, which is of fundamental importance to the entire natural gas industry and all interstate gas consumers, as to which interpretation there is a direct conflict between United States Courts of Appeals.

Although the Court of Appeals for the Tenth Circuit, below, recognized that CIG proposed *no change* in its existing minimum bill provision with Natural, that Court nevertheless held that the Natural Gas Act allows the Commission to change such a provision *retroactive* to the date CIG's rate change filing became effective, subject to refund. That decision is in direct conflict with a number of decisions of the Courts of Appeals for the District of Columbia Circuit and Fifth Circuit on the identical issue. It is clearly untenable for interstate pipeline companies and their consumers to be treated differently in different Courts of Appeals on the *same* issue. This issue arises in virtually every pipeline rate case, and is obviously of great importance to the natural gas industry and gas consumers, and to the administration of the Natural Gas Act. Finally, the Court of Appeals' decision below is based upon an erroneous interpretation not only of the NGA, but also of decisions of other Courts of Appeals upon which the decision below relies.

REASONS FOR GRANTING THE PETITION

I. The Court Of Appeals Has Rendered A Decision Which Is In Direct Conflict With The Decisions Of Other Courts Of Appeals.

The fundamental issue in this case is whether the Commission has the authority to *retroactively* modify an existing, Commission-approved tariff provision which CIG did not propose to modify and which had been in place for many years. This issue has been addressed in numerous Courts of Appeals' decisions and, until the issuance of the decision below by the Court of Appeals for the Tenth Circuit, those decisions have each reached the same conclusion—the Commission has no authority to modify an *unchanged* tariff provision *retroactively*.[2] Such change must be made pursuant to the requirements of Section 5 of the NGA, which limits the Commission's power to *prospective* relief. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 645 (1972). The Commission, however, has continued to seek to circumvent those principles, but until the case below, has been uniformly reversed by the Courts of Appeals.

The most recent in this series of Courts of Appeals' decisions is *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182 (D.C. Cir. 1986). In *Sea Robin*, the Commission attempted to *retroactively* change a pipeline company's existing methodology for calculating a transportation rate, even though the company had proposed no change in such methodology. Since the retroactive change in methodology resulted in lower rates for certain customers, the Commission ordered Sea Robin Pipeline Company ("Sea Robin") to make refunds to those customers. In

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[2] That conclusion is reinforced by the fact that the Commission's refund (retroactive application) authority under Section 4 applies only to rates or provisions which are suspended by the Commission, *Moss* v. *FPC*, 502 F.2d 461 (D.C. Cir. 1974), *rev'd on other grounds*, 424 U.S. 494 (1976). In this proceeding, the minimum bill provision was not suspended.

attempting to support this retroactive modification, the Commission argued that, since the company had filed a general rate increase filing, the Commission could review the unchanged tariff provision pursuant to its Section 4 authority, alleging as the basis that such provision was an "integral part" of the rate increase filing. The Court of Appeals rejected the Commission's argument, holding (795 F.2d at 187):

> The Commission's action . . . does not fall into the narrow Section 4 range of acceptance or disapproval of a pipeline's proposed changes; rather, the order imposes on Sea Robin a completely new rate prescription, neither proposed nor previously used by the pipeline. Such action is authorized only under Section 5. *See City of Willcox* v. *FPC*, 567 F.2d 394, 402 (D.C. Cir. 1977), *cert. denied*, 434 U.S, 1012, 98 S.Ct. 724, 54 L.Ed.2d 755 (1978).

The Court further emphasized that there are clear differences between the Commission's authority and review process under Sections 4 and 5 of the NGA stating (795 F.2d at 183):

> The Commission is not free to blend, or pick and choose at will between its Section 4 and 5 authority; FERC must use the appropriate authorization in the appropriate way in order to remain with the bounds Congress has set for the agency.

In specific reference to the retroactive aspect of the Commission's order, the Court concluded that since the Commission could only act pursuant to its authority under Section 5, the "FERC may order *only prospective relief* if it finds a *previously accepted provision* unlawful". 795 F.2d at 187 (emphasis added).

The decision in *Sea Robin* is consistent with the holdings of several earlier decisions issued by the Court of Appeals for the District of Columbia Circuit, which address the same issue as that involved in *Sea Robin*. The first is *Public Commission of New York* v. *FERC*, 642

F.2d 1335 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 879 (1981) (hereinafter referred to as "Transco"). In *Transco*, the Court of Appeals also rejected a Commission decision to apply Section 4 standards to an *unchanged tariff provision*. As in *Sea Robin*, the Commission argued that its review of the unchanged tariff provision could be undertaken pursuant to Section 4 of the NGA, since the pipeline had filed a general rate increase. In rejecting this argument, the Court of Appeals stated (642 F.2d at 1345):

> Had Transco proposed any changes in [its existing zone rate differentials in its tariff], the Commission, acting under Section 4(e), could have approved the changes in whole or in part. *Section 4(c), however, cannot be used by the Commission to institute any change in a ratemaking component*, such as cost allocation, *that does not represent at least partial approval of the change for which the enterprise had petitioned in its filing.* If the Commission seeks to make such changes, it has no alternative save compliance with the strictures of Section 5(a). (Emphasis added).

In *ANR Pipeline Company* v. *FERC*, 771 F.2d 507, 513 (D.C. Cir. 1985), the Court of Appeals adhered to the *Transco* decision and again emphasized that Section 4 and Section 5 "are not alternatives within the FERC's discretion to select; each is a limited grant of authority to the Commission." The Commission must act pursuant to the requirements of Section 5 if it seeks to impose "a change not proposed by the natural gas company—including *an alteration in an unchanged part of a proposed higher rate . . .*" 771 F.2d at 514.

The Court of Appeals for the Fifth Circuit has made the same interpretation of the Natural Gas Act. In *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d 509, 524 (5th Cir. 1981), the Court held that the pipeline company "was not required to re-prove the established cost methodology," which the company had not proposed

to change, but was only required to prove that the proposed rate levels, based upon that methodology, which levels *were* changed, were just and reasonable.

In contrast to the District of Columbia and Fifth Circuits, the Court of Appeals for the Tenth Circuit has here issued a decision which is in direct conflict with the cases described above. The proeceding before the Tenth Circuit involved a case which is virtually identical to those involved in the decisions cited above. Specifically, CIG had filed a general rate increase at the Commission pursuant to Section 4. In that filing, CIG proposed no change in the minimum bill provision in its tariff. There was no mention of this provision in the Commission's order suspending CIG's rate increase filing. Subsequently, after a hearing, the Commission ordered CIG to *retroactively* change this provision. On appeal, the Tenth Circuit affirmed the Commission's order. In so doing, the Court did not even mention the decisions in *Transco*, *ANR* and *New Orleans Public Service*.[3] The Court made no effort to reconcile its decision with those earlier cases. In CIG's request for rehearing to the Court, CIG pointed out the conflict between its decision and those of other Courts of Appeal; however, the Court still chose to ignore the earlier decisions.

The decisions of the District of Columbia and Fifth Circuits have consistently applied the standards set forth in the *Transco* decision, which holds that the Commission must act pursuant to the strictures of Section 5 if it desires to change or modify an existing tariff provision which the applicant has not proposed to change. This holding is applicable even if the applicant has made a Section 4 general rate increase filing which includes the unchanged tariff provision. "This limitation allows the pipeline to rely on a filed rate or tariff provision, once the Commission has permitted it to become effective, until

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[3] The *Sea Robin* decision was issued subsequent to the issuance of the Tenth Circuit's decision in this case.

such time as the rate is proved to be unlawful." *Sea Robin*, 795 F.2d 182, 184 (D.C. Cir. 1986). Without such a limitation, pipelines would never have any rate certainty, which is untenable for the gas industry.

As the foregoing demonstrates, a clear conflict between Courts of Appeals has been established. Under these circumstances, granting this petition for certiorari is appropriate. *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557, 559 (1968); *Northeastern Pennsylvania National Bank & Trust Co.* v. *United States*, 387 U.S. 213, 217 (1967). Rule 17, Supreme Court of the United States.

II. A Uniform And Appropriate Interpretation Of The Question Presented Here Is Of Paramount Importance To The Natural Gas Industry.

A large number of companies are regulated by the Commission pursuant to its NGA Sections 4 and 5 authority, and the rates of such companies relate to the bulk of the natural gas sold in the United States. Each time one of these companies makes a general rate increase filing, the issue involved here is present. Pursuant to the Commission's Regulations, each interstate gas pipeline company must make at least one rate filing every three years. Generally, however, interstate pipelines file more often than that. Thus, it is clear that the issue involved here is constantly before the Commission. The Commission persists in its misinterpretation of the Natural Gas Act in multiple cases at the Commission level and the issue has required appeal on numerous occasions. Now that the Commission has finally secured a decision—albeit erroneous—which has adopted its position, the issue is certain to recur repeatedly, until finally resolved by this Court. Given the large number of cases involving this issue, it is obvious that a uniform resolution of the issue is of great importance to the administration of law, as well as to the natural gas industry.

III. The Court Of Appeals Supported Its Decision On An Erroneous Interpretation Of Previous Courts Of Appeals' Decisions.

The error of the decision below is shown clearly by the fact that to try to support its position, the Tenth Circuit relied on a District of Columbia Court of Appeals' opinion which the District of Columbia Circuit itself has held does not support the proposition which the Tenth Circuit thinks that opinion supports. That is, the Tenth Circuit, below, relied heavily on *Cities of Batavia* v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982), and cites (791 F.2d at 807, App. A at 6a) that case after stating:

> The Commission may review a gas company's rate structure to insure that all parts of the structure—both old and new—operate together to produce just and reasonable rates.

The Commission also relied on *Cities of Batavia* and made the same argument to support its position that it could review an unchanged provision in Sea Robin's rate increase filing pursuant to its Section 4 authority. However, in *Sea Robin*, the same Court which issued the *Cities of Batavia* decision rejected the Commission's argument, stating (795 F.2d at 187):

> *Cities of Batavia* merely observes that in a section 4 proceeding, the Commission may evaluate the new proposed rates in light of all the old, existing provisions. If the Commission disapproves of the interaction between old and new rate provisions, it has the power under section 4 to reject the new rate, partially or completely, and reinstate the old one. *But neither section 4 nor the* Cities of Batavia *opinion gives the Commission the authority to reject, post hoc, a previously accepted provision or to specify what should replace it.* (emphasis added).

From the foregoing language in *Sea Robin*, it is clear that the Tenth Circuit's reliance on *Cities of Batavia* to

justify the *retroactive* alteration of an *unchanged* tariff provision is inappropriate and in error.[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 29, 1986

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[4] The Tenth Circuit also cited *Laclede Gas Co.* v. *FERC*, 670 F.2d 38 (5th Cir. 1982). *Laclede* involved the identical issue as that in *Cities of Batavia*; therefore, the reasoning in *Sea Robin* is equally applicable to the Court's reliance on *Laclede*. The Commission, in *Cities of Batavia* and *Laclede*, did not, as it did here, attempt to modify an unchanged *tariff provision*. Rather, these cases involved a modification of the rates themselves. Similarly, the other cases relied on by the Tenth Circuit, *Florida Gas Transmission Co.* v. *FERC*, 741 F.2d 1307 (11th Cir. 1984) and *North Penn Gas Co.* v. *FERC*, 707 F.2d 763 (3rd Cir. 1983), like *Laclede* and *Cities of Batavia*, did not address the issue of whether an unchanged tariff provision can be changed retroactively, but instead also dealt with rate levels.

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 84-2286, 85-1171

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

NATURAL GAS PIPLINE COMPANY OF AMERICA; THE PEOPLES GAS LIGHT and COKE COMPANY, and NORTH SHORE GAS COMPANY; PUBLIC SERVICE COMPANY OF COLORADO, WESTERN GAS SUPPLY COMPANY and CHEYENNE LIGHT, FUEL AND POWER COMPANY; THE CITY and COUNTY OF DENVER, COLORADO; KN ENERGY, INC.; MIGC, INC.; and the CITY OF COLORADO SPRINGS, COLORADO,
Intervenors.

May 19, 1986

Before BARRETT, McKAY and TACHA, Circuit Judges.

TACHA, Circuit Judge.

This case consolidates appeals from two orders of the Federal Energy Regulatory Commission (Commission) issued in the course of a rate increase proceeding under § 4 of the Natural Gas Act. This court has jurisdiction

to review these orders pursuant to 15 U.S.C. § 717r. The questions presented are whether the Commission acted within its authority in (1) ordering retroactive modification of a contract provision that the company seeking the rate increase did not propose to change, and (2) rejecting the company's compliance filing. We affirm the orders of the Commission.

This case has a long and complicated procedural history which will be outlined briefly. Colorado Interstate Gas Company (CIG) is engaged in the interstate sale of natural gas. Pursuant to a series of service agreements, Natural Gas Pipeline Company of America (Natural) has purchased gas from CIG since 1955. Currently Natural purchases gas from CIG at two different rates, F-1 and H-1. Each rate has two components, a commodity charge and a demand charge. The commodity charge includes all variable costs (mainly the cost of the gas) plus certain fixed costs. The demand charge includes all fixed costs not allocated to the commodity charge. The F-1 rate covers field sales; the H-1 rate covers sales from CIG's mainline facility. The H-1 rate is higher than the F-1 rate because it includes fixed costs of storage and transmission facilities.

The service agreement existing between CIG and Natural at the start of this regulatory action, like the previous service agreements between the companies, contains a minimum commodity bill. This minimum bill provision requires Natural to take or pay for 90% of the volume of gas to which it is contractually entitled. According to the minimum bill, all deficiency charges, whether arising under the F-1 or the H-1 rate schedules, are assessed at the lower F-1 rate. Prior to 1983, the pay provision of the minimum bill had never been triggered.

In March 1982, CIG initiated a general rate increase proceeding under § 4 of the Natural Gas Act, 15 U.S.C. § 717c. The rate increase neither altered nor mentioned the minimum bill provision in the service agreement be-

tween Natural and CIG. Natural and several other gas companies intervened in the § 4 proceeding. Pursuant to 15 U.S.C. § 717c, the Commission suspended the rate increase until September 29, 1982, after which CIG's increased rates became effective subject to refund.[1]

CIG filed a proposed stipulation and agreement which the intervenors, with the exception of Natural, accepted. Natural opposed the settlement because it failed to modify the minimum bill, a provision Natural contended was unreasonable and discriminatory. The Administrative Law Judge (ALJ) issued an order severing the minimum bill issue and certifying the remaining portion of CIG's settlement to the Commission.[2] The ALJ specifically noted in his order that rates charged Natural under the minimum were subject to refund.

The Commission approved the settlement proposal as certified by the ALJ, finding that the settlement reasonably resolved the issues with which it was concerned.[3] The Commission noted that the minimum bill issue remained unresolved.

The minimum bill issue then proceeded to a hearing before the ALJ. The ALJ concluded that the minimum bill as constituted was not just and reasonable because the provision required Natural to pay the variable costs of gas that it did not take.[4] He replaced the minimum bill with a demand charge designed to enable CIG to recover all fixed costs allocable to Natural. The ALJ determined that the demand charge should be given prospective effect. The Commission concurred in the ALJ's finding that the minimum bill imposed by CIG was not

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[1] 19 F.E.R.C. ¶ 61,071 (issued April 28, 1982).

[2] 22 F.E.R.C. ¶ 63,040 (issued January 28, 1983).

[3] 22 F.E.R.C. ¶ 61,330 (issued March 10, 1983).

[4] 25 F.E.R.C. ¶ 63,012 (issued October 18, 1983).

just and reasonable.[5] The Commission, however, permitted CIG to retain the minimum bill but ordered CIG to modify the provision so as to preclude the collection of variable costs. The Commission made this modification retroactive to the effective date of CIG's rate increase.[6] CIG sought rehearing which the Commission denied.[7]

CIG's proposed revision of the minimum bill was rejected by the Commission as not in compliance with the modification order.[8] The Commission denied CIG's request for a rehearing.[9] This appeal followed.

During the course of the § 4 proceeding, CIG was also involved in a § 7 proceeding. In the § 7 proceeding, CIG sought and was issued a certificate of public convenience and necessity authorizing CIG to increase its sales to Natural.[10] Upon issuance of the certificate, CIG and Natural entered into a new service agreement which was accepted by the Commission.[11]

The questions on appeal are whether the Commission acted within its authority in (1) ordering modification of the minimum commodity bill in the service agreement between CIG and Natural retroactive to the effective date of CIG's 1982 rate increase, and (2) rejecting CIG's revised minimum commodity bill compliance filing.

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[5] 27 F.E.R.C. ¶ 61,315 (issued May 25, 1984).

[6] During the pendency of the § 4 proceedings, Natural decreased its purchase of gas below 90% of its entitlement, triggering the minimum bill pay provision. By ordering retroactive, rather than prospective, modification of the minimum bill, the Commission precluded CIG from collecting approximately $20 million in deficiency charges Natural incurred prior to the Commission's modification order.

[7] 28 F.E.R.C. ¶ 61,083 (issued July 23, 1984).

[8] 29 F.E.R.C. ¶ 61,124 (issued October 31, 1984).

[9] 30 F.E.R.C. ¶ 61,112 (issued February 1, 1985).

[10] 19 F.E.R.C. ¶ 61,283 (issued June 24, 1982).

[11] 21 F.E.R.C. ¶ 62,263 (issued November 1, 1982).

I.

The first question we address is whether the Commission acted within its authority in giving retroactive effect to the minimum bill revision.

A.

CIG concedes that the minimum bill was unjust and unreasonable and thus subject to prospective modification under § 5 of the Natural Gas Act. The question raised in this case is whether the Commission had the authority to order retroactive modification under § 4. The primary purpose of the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, is to protect consumers from exploitation at the hands of natural gas companies, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 610, 64 S.Ct. 281, 291, 88 L.Ed. 333 (1944). This purpose is achieved through the Commission's plenary review of the contracts and rate schedules established by such companies. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784, 88 S.Ct. 1344, 1368, 20 L.Ed.2d 312 (1968); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 341, 76 S.Ct. 373, 379 100 L.Ed. 373 (1956). The Commission conducts this plenary review pursuant to proceedings initiated under §§ 4 and 5 of the Natural Gas Act. In proceedings under either section, the Commission determines whether the rates fixed by natural gas companies are just and reasonable, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. at 341, 76 S. Ct. at 379.

Though the ultimate issue is the same under either section, the Commission's power in reviewing a company's rates and the means of initiating Commission review differ under the two sections. A § 5 rate proceeding, in which the Commission reviews previously established rates of a natural gas company, is initiated upon the Commission's own motion or upon the complaint of third parties. The moving or complaining party has the burden of proving the established rates are unjust and unreason-

able. If the moving party successfully meets that burden, the Commission sets the rates the natural gas company may charge thereafter. Only prospective relief from unjust rates is available in a § 5 proceeding. 15 U.S.C. § 717d(a); *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 70 S.Ct. 1246, 1253, 3 L.Ed.2d 1312 (1959).

The filing of new rates by a natural gas company triggers Commission review under § 4. In a § 4 proceeding, the gas company has the burden of justifying its newly filed rates. If the gas company fails to show that its increased rates are just and reasonable, the Commission modifies the rates. This modification may be made retroactive through the Commission's refund power to the date the increased rates became effective. 15 U.S.C. § 717c(e); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. at 341, 76 S.Ct. at 379.

Section 4 of the Natural Gas Act gives the Commission broad authority to scrutinize new rates filed by a gas company to insure that such rates are just and reasonable. The Commission may review a gas company's rate structure to insure that all parts of the structure—both old and new—operate together to produce just and reasonable rates. *See City of Batavia v. Federal Energy Regulatory Comm'n*, 672 F.2d 64, 75-77 (D.C.Cir.1982) (dealing with a similar section of the Federal Power Act, 16 U.S.C. § 824d[e]). By filing the rate increase, a gas company assumes the risk of having to justify its entire rate structure, *see Federal Power Comm'n v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152, 83 S.Ct. 211, 215, 9 L.Ed.2d 199 (1962), including integral provisions of that structure which the company does not propose to change, *Florida Gas Transmission Co. v. Federal Energy Regulatory Comm'n*, 741 F.2d 1307, 1311 (11th Cir. 1984); *North Penn Gas Co. v. Federal Energy Regulatory Comm'n*, 707 F.2d 763, 769 (3d Cir.1983); *City of Batavia v. Federal Energy Regulatory Comm'n*, 672 F.2d

at 75-77; *Laclede Gas Co. v. Federal Energy Regulatory Comm'n*, 670 F.2d 38, 41-42 (5th Cir.1982). A provision which serves as a charging mechanism is considered an integral part of a rate increase and a gas company's rate structure. *Cf. Laclede Gas Co. v. Federal Energy Regulatory Comm'n*, 670 F.2d at 41-42 (finding a purchased gas adjustment clause is necessarily a part of a new rate filing, and thus subject to § 4 scrutiny, because it is "an integral part of the manner in which rates are charged").

CIG filed a rate increase under § 4, but the rate filing proposed no change in the minimum bill. The propriety of subjecting the minimum bill to review under § 4 requires a finding that the provision is integal to the rate structure of CIG. Both the ALJ and the Commission found that the bill is an essential part of the rate structure. We must uphold this factual finding if it is supported by substantial evidence. 15 U.S.C. § 717r(b); *Permian Basin Area Rate Cases*, 390 U.S. at 767, 88 S.Ct. at 1360.

The ALJ set forth the basis of this factual finding as follows:

> Inasmuch as the rates applicable to Natural under the F-1 and the H-1 Rate Schedules are volumetric rates, all fixed and variable costs previously allocated to Natural pursuant to the partially approved settlements are included in these one-part volumetric rates. CIG's Section 4 rate filing increased rate components included in the F-1 and H-1 Rate Schedules, and, accordingly, the charge flowing from implementation of the minimum bill provisions were also affected. To invoke the minimum bill provisions, CIG must turn to its F-1 and H-1 Rate Schedules as well as its service agreement to determine its charges to Natural.
>
> Hence, the proposed rate increase inflates the impact of the minimum bill provisions which are com-

> ponents of the entire rate design. Unlike other aspects of the longstanding service agreement which have no different impact upon a purchaser after a rate increase, the charges which can be collected under minimum bill provisions flex in tandem with a rate increase. Clearly, the minimum bill provisions are an integral part of the rate increase . . . .

25 F.E.R.C. ¶ 63,012 at 65,015.

As the ALJ found, CIG's rate increase elevated the impact of the minimum bill. Natural is CIG's second largest customer and purchases about 25% of the gas CIG sells. Thus, the minimum bill, which requires Natural to pay for 90% of its annual entitlement even if it takes no gas, guarantees a large and constant source of payment for CIG. This guaranteed payment has a major impact on CIG and its rate structure. The Commission's determination that the minimum bill is an integral aspect of the CIG rate structure and therefore is subject to § 4 review is supported by substantial evidence.

The Commission's suspension order in this proceeding specifically provided for retroactive refund. This order preserved the Commission's power to revise each integral provision of the rate structure, including the minimum bill provision, retroactively. *See Florida Gas Transmission Co. v. Federal Energy Regulatory Comm'n*, 741 F.2d at 1311. That the minimum bill issue was severed and dealt with separately from the remainder of the rate increase filing in no way eliminated or limited the Commission's authority to order refund. The Commission's authority was preserved as to each issue until the issue was resolved.

B.

Our consideration of the Commission's power to order the modification retroactively is complicated by the fact that, during the pendency of the § 4 proceeding, CIG and Natural entered into a new service agreement which was

accepted by the Commission pursuant to § 7 of the Natural Gas Act. The questions raised by these circumstances are (1) whether the Commission's suspension order applies to the new agreement between CIG and Natural, and (2) whether Commission acceptance of that agreement in the § 7 proceeding precludes the Commission from ordering retroactive modification of the minimum bill.

The minimum bill which was in effect at the time the Commission suspended the rate increase was superseded by an identical provision in the subsequent service agreement between CIG and Natural. The new agreement was executed three months after the Commission suspended the rate increase. Since the Commission may order retroactive refund only where a company's rates have been suspended pending § 4 review, *Moss v. Federal Power Comm'n*, 502 F.2d 461, 469 (D.C.Cir.1974), *rev'd on other grounds*, 424 U.S. 494, 96 S.Ct. 1003, 47 L.Ed.2d 186 (1978), and the new minimum bill provision was enacted after the Commission suspension, the question is raised whether the suspension order applies to the new minimum bill provision.

The new minimum bill provision is identical in all respects to the bill in the service agreement in existence when CIG filed its rate increase. The lone difference between the two service agreements is that the new agreement entitles Natural to a slightly greater quantity of gas. The new agreement and its minimum bill did not create a new contractual arrangement but rather extended their prior counterparts. The previous agreement and minimum bill were subject to the suspension order. Since the new bill merely extended the operation of the prior bill, the suspension order applied to the new provision and empowered the Commission to act upon it.

The Commission's issuance of a certificate of public convenience and necessity under § 7 authorizing CIG to

increase its sales to Natural had no effect on the Commission's § 4 refund power. While the § 4 rate proceeding progressed, CIG was involved concurrently in a proceeding under § 7 of the Natural Gas Act. In the § 7 proceeding, CIG sought the issuance of a certificate of public convenience and necessity authorizing a change in the entitlements of several of its customers. The lone change proposed by CIG concerning Natural involved a slight increase in Natural's annual entitlement. The Commission issued a certificate authorizing the changes requested by CIG. CIG and Natural then executed and filed the new service agreement which the Commission accepted. Refund conditions were not attached to the certificate or the acceptance of the new service agreement.

Proceedings under § 4 and proceedings under § 7 are separate and distinct. Proceedings under § 4 focus on whether a natural gas company's rates are just and reasonable. 15 U.S.C. § 717c(a); *see Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. at 612, 64 S.Ct. at 292. Proceedings under § 7, on the other hand, focus on whether actions proposed by a natural gas company are "required by the present or future public convenience and necessity" and whether the company "is able and willing properly to do the acts. . . ." 15 U.S.C. § 717f(e); *see Federal Power Comm'n v. Hunt*, 376 U.S. 515, 525, 84 S.Ct. 861, 867, 11 L.Ed.2d 878 (1964). In a § 7 proceeding, the Commission must consider whether a company has the financial and physical resources to perform a proposed act and how that act will affect the general public and the natural gas industry. *Id.*

Scrutiny of a company's rates and charges often is vital in determining whether proposed actions should be certificated as being in the public interest. *See Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. at 390-91, 79 S.Ct. at 1254-55. That determination, however, does not depend on a finding that the rates are just and reasonable. *Federal Power Comm'n v. Hunt*, 376 U.S. at 523-

24, 84 S.Ct. at 866-67; *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. at 390-91, 79 S.Ct. at 1254-55. "[A] section 7 proceeding is not to be equated with a proceeding under section 4 or section 5 to determine a just and reasonable rate." *Texaco, Inc. v. Federal Power Comm'n*, 290 F.2d 149, 157 (5th Cir.1961). The Commission had no duty to determine the justness of CIG's rate structure and minimum bill in the § 7 proceeding.

The sections 4 and 7 proceedings CIG initiated were independent. The foci of the proceedings differed; the factors the Commission considered in making its determinations differed. The § 7 orders did not preclude the Commission from retroactively modifying the minimum bill.

In summary, the minimum bill was subject to § 4 review as an integral part of CIG's rate structure, the Commission preserved its power to order refund in its suspension order, and the Commission's § 7 orders had no effect on its § 4 refund power. Therefore, we find that the Commission acted within its authority in ordering retroactive modification of CIG's minimum bill under § 4 of the Natural Gas Act.

II.

Also at issue in this appeal is whether the Commission properly rejected CIG's compliance filing modifying the minimum bill provision. The ALJ concluded that the minimum bill, which required Natural to pay both the fixed and variable costs of gas it did not take, was unreasonable and unjustified by the actual costs CIG incurred in providing service to Natural. He reasoned that CIG should be guaranteed recovery of the fixed costs it incurred in serving Natural. He therefore replaced the minimum bill with a demand charge designed to enable CIG to recover all fixed costs allocable to Natural.

The Commission's modification order affirmed the ALJ's finding that the minimum bill imposed by CIG was not

just and reasonable. The Commission, however, permitted CIG to retain the minimum bill but ordered CIG to revise it so as to preclude the collection of gas costs and other variable costs. The Commission made this revision retroactive to the effective date of CIG's rate increase. CIG sought rehearing only as to the propriety of ordering retrospective revision of the minimum bill. The Commission denied rehearing, and CIG filed revised rate schedules in an attempt to comply with the Commission's modification order. This filing (1) eliminated all variable costs from the minimum bill provision of the CIG-Natural service agreement, (2) listed the fixed cost component of rate schedules F-1 and H-1, and (3) modified the minimum bill so that deficiency charges incurred by Natural could be assessed at either the F-1 or the H-1 rate (depending under which schedule the deficiency arose) rather than at the lower F-1 rate at which all deficiencies had previously been assessed. The Commission rejected the filing because CIG's modification of the minimum bill to enable recovery of fixed costs at the higher H-1 rate was not permitted by the Commission's modification order. The Commission denied CIG's request for rehearing.

The initial question regarding this issue is whether CIG is jurisdictionally barred from seeking judicial review of the Commission's rejection of the compliance filing. CIG's appeal, though procedurally from the Commission rulings rejecting the compliance filing, actually challenges the scope of the Commission's modification order. CIG sought a rehearing within 30 days of the modification order and thus this appeal is not jurisdictionally defective. 15 U.S.C. 717r(a); *Distrigas Corp. v. Federal Energy Regulatory Comm'n*, 608 F.2d 25, 27 (1st Cir.1979) (per curiam). However, in its request for rehearing CIG objected only to making the minimum bill modification effective retroactively; CIG did not question the scope of the Commission's modification order. CIG's

failure to raise this specific challenge in its application for rehearing thus presents a question of waiver.

Courts of appeals generally will not consider an objection to an order of the Commission unless that objection was urged by the aggrieved person in his application for rehearing. 15 U.S.C. § 717r(b); *Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-99, 75 S.Ct. 467, 470-71, 99 L.Ed. 583 (1955). Failure to raise an objection in one's application for rehearing waives the objection unless there is a reasonable ground excusing the failure below. *Id.; e.g., Atlantic Richfield Co. v. Federal Power Comm'n*, 585 F.2d 943, 946 (9th Cir.1978).

The circumstances of this case present such a reasonable ground. The Commission's modification order specifically required CIG to amend its minimum bill to eliminate the collection of variable costs. The order did not specifically permit CIG to modify the minimum bill to allow fixed cost recovery at the higher H-1 rate. The broad language used by the Commission in the order, however, raised the possibility of Commission approval of a minimum bill that would recover *all* fixed costs allocable to Natural. Full recovery of these fixed costs could be had only if deficiencies under the H-1 rate schedule could be assessed under the minimum bill at the H-1 rate. The Commission's rather loose language left it unclear whether CIG could incorporate its higher H-1 rate in its modified minimum bill.

This ambiguity excuses CIG's failure to question the scope of the ordered modifications in its application for rehearing following the modification order. It was not until the Commission rejected CIG's compliance filing that the company knew inclusion of the H-1 rate in the minimum bill would not be allowed. CIG did not know that it was aggrieved by the Commission's modification order until the Commission rejected its compliance filing. Since CIG was unaware it was aggrieved, CIG has not waived its right to raise this objection. *Cf. Midwestern*

Gas Transmission Co. v. Federal Energy Regulatory Comm'n, 734 F.2d 828, 832 (D.C.Cir.1984) (when a Commission order clearly aggrieves a person, failure to request a rehearing within 30 days bars judicial review).

The question on the merits is how to resolve the ambiguity in the Commission's order. An agency's interpretation of its own order is entitled to great weight. *Amoco Production Co. v. Federal Power Comm'n*, 491 F.2d 916, 921 (10th Cir. 1973) (citing *Permian Basin*, 390 U.S. at 767, 88 S.Ct. at 1360). When an agency order is ambiguous, a court will uphold the agency's interpretation unless it is arbitrary and capricious. *Chesapeake & O. Ry. Co. v. United States*, 571 F.2d 1190, 1194 (D.C.Cir.1977). Under this standard, we must uphold the Commission's interpretation of its modification order.

First, the Commission rejected the ALJ's use of a demand charge. The demand charge, if implemented, would have allowed CIG to recover all of its fixed costs regardless of the amount of gas Natural purchased. A minimum bill assessing F-1 deficiencies at the F-1 rate and H-1 deficiencies at the H-1 rate likewise would have insured CIG full fixed cost recovery. It is reasonable to assume the Commission intended that CIG's fixed cost recovery under the modified minimum bill would differ from the fixed cost recovery under the disapproved demand charge. Requiring CIG to continue to assess all deficiencies at the F-1 rate would result in a different fixed cost recovery than under the demand charge.

Furthermore, in its modification order the Commission expressed concern that guaranteed recovery of fixed costs might lessen CIG's incentive to increase sales to Natural or make its operations more efficient. Guaranteeing full fixed cost recovery, as CIG's interpretation of the modification order would do, is inconsistent with this concern. The Commission's interpretation of the order en-

courages CIG to sell gas to Natural because by doing so CIG can recover its H-1 fixed costs.

Finally, in its modification order the Commission deferred investigation of the proper level of fixed cost recovery under the minimum bill until CIG's next rate filing. It is consistent with this deferral to assume the Commission intended its minimum bill modification would eliminate the collection of variable costs but would leave the basic take or pay mechanism intact. Continued exclusive use of the F-1 rate is consistent with this assumption.

In light of the considerations detailed above, the Commission's interpretation of its modification order is reasonable. The Commission's determination that the minimum bill should not provide CIG with full fixed cost recovery is rational supported by substantial competent evidence. The Commission acted within its authority in rejecting CIG's compliance filing.

AFFIRMED.

APPENDIX B

MAY TERM

July 2, 1986

Nos. 84-2286 & 85-1171

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

NATURAL GAS PIPELINE COMPANY OF AMERICA; THE PEOPLES GAS LIGHT AND COKE COMPANY, and NORTH SHORE GAS COMPANY; PUBLIC SERVICE COMPANY OF COLORADO; WESTERN GAS SUPPLY COMPANY and CHEYENNE LIGHT, FUEL AND POWER COMPANY; THE CITY AND COUNTY OF DENVER, COLORADO; K N ENERGY, INC.; MIGC, INC.; and THE CITY OF COLORADO SPRINGS, COLORADO,
Intervenors.

This matter comes on for consideration of petitioner's petition for rehearing and suggestion for rehearing en banc in the captioned causes.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX C

COLORADO INTERSTATE GAS COMPANY

Docket No. RP82-54-000

ORDER AFFIRMING INITIAL DECISION IN PART AND REVERSING INITIAL DECISION IN PART

(Issued May 25, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, J. David Hughes, A. G. Sousa and Oliver G. Richard III.

In this proceeding we are considering whether the minimum bill commodity provision in Colorado Interstate Gas Company's (CIG) tariffs governing natural gas sales to Natural Gas Pipeline Company of America is just and reasonable. All other issues in the proceeding have been settled.[1] The administrative law judge issued an initial decision on the contested issue in which he found that CIG had not shown the minimum bill provision to be just and reasonable and, therefore, the provision was without force and effect. He also directed CIG to institute a monthly demand charge to Natural which would recover 100 percent of the fixed costs allocated to Natural. Except as is discussed below, we agree with his decision and affirm and adopt it.

The minimum annual bill provides that Natural must pay the full commodity charge on a minimum of 90 percent of its contract quantity even if it actually takes less than that amount. The commodity charge recovers both fixed and variable costs. Natural has no right to make

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[1] Our order accepting the settlement appears at 22 FERC ¶ 61,330.

up gas volumes it fails to take but for which it must pay the minimum bill charge. It is the only customer on CIG's system subject to a minimum annual bill.

While we agree with the judge that CIG failed to justify its minimum annual bill,[2] we believe some amplification of his decision is in order. In the first place, we wish to emphasize that our decision does not rest solely on the ground that CIG failed to meet its burden of proof. There is ample evidence in the record demonstrating that CIG's minimum bill is not just and reasonable. The judge clearly delineated this evidence in the initial decision, and we need not reiterate it here.[3]

Also, our conclusion that CIG's minimum bill to Natural is not just and reasonably does not mean that CIG may not employ a minimum bill in serving that customer. In *Atlantic Seaboard Corp.*, 38 FPC 91 (1967) we identified three ratemaking functions, any one of which could justify a minimum commodity bill. These are: (1) the recovery of that portion of a pipeline's rates

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[2] The judge, while finding in its initial decision that CIG's minimum bill was not just and reasonable, concluded that there was insufficient evidence in the record to conclude that the minimum bill was anticompetitive or unduly discriminatory. Natural did not take exception to these conclusions. However, in Natural's brief opposing exceptions, it states that the minimum bill is not just and reasonable because of its anticompetitive and discriminatory effects. CIG has moved to strike those portions of Natural's brief opposing exceptions relating to those two arguments because they were not raised in Natural's brief on exceptions. We gave no weight to these arguments in reaching our decision. Accordingly, we take no action on the motion to strike.

[3] CIG presented no evidence at the hearing. It requests that, if we find that it has the burden of proof and that it has not met that burden, we reopen the record to permit CIG to present evidence on the minimum bill. CIG's request is denied. Whether CIG bore the burden of proof or not, it had ample opportunity to present evidence. Its failure to do so was at its peril. Remanding the case for a further evidentiary hearing would needlessly delay resolution of the proceeding and would be unfair to other parties.

which allocate fixed charges to the commodity portion, (2) the protection of customers with no alternative supply from having to bear the cost of facilities constructed for a customer which obtains an alternative source, and (3) the minimum take-or-pay obligation which a pipeline has to its suppliers. Here, CIG's minimum bill collects the fixed cost portion of its commodity charge as well as variable costs. We believe that a minimum commodity bill limited to recovery of the pipeline's fixed costs would be just and reasonable.

The judge recognized that, due to CIG's dependence on Natural as a major customer, there was a reasonable basis for applying a minimum bill to Natural. We agree with this conclusion. However, rather than formulating a just and reasonable minimum bill to be applied, he directed CIG to impose a demand charge which would recover 100 percent of fixed costs from the customer. We disagree with this remedy. Such a charge is not the most appropriate means of assuring that CIG recovers all fixed costs which have been allocated to Natural.

In our view, this goal can be better achieved simply by eliminating variable costs from the minimum bill. This would give CIG an inducement to maintain or increase its sales to Natural above the contract minimum because CIG could charge the full volumetric rate, including fixed and variable costs, on all gas sold above the contract minimum. And fixed costs include return on equity. The demand charge proposed by the judge, on the other hand, provides no such incentive because it would enable CIG to recover all fixed costs, including full return on equity, allocated to Natural regardless of the amount of gas Natural purchased. Accordingly, we will require CIG to amend the minimum bill provision of its tariff to Natural to eliminate all variable costs from the minimum bill.

We note that the question of whether CIG's minimum bill should be predicated on Natural taking 90 percent

of its minimum contract quantity has not been addressed in this proceeding. The record is not sufficient for us to determine whether the 90 percent figure is just and reasonable. We are concerned, however, because CIG's rates in this docket are designed so CIG will recover 100 percent of its fixed costs if Natural takes 90 percent of its contract quantity. This means that the minimum bill will enable CIG to recover 100 percent of its fixed costs allocated to Natural from that company. It isn't clear whether guaranteed full fixed cost recovery provides sufficient incentives for efficiency. We believe this matter should be investigated in CIG's next rate case. Accordingly, we direct the staff to consider the proper level of fixed cost recovery for CIG's minimum commodity bill in CIG's next section 4 rate case.

This leaves the question of whether our disposition of the minimum bill issue should be prospective or retrospective. We believe it should be retrospective. In our order accepting the partial settlement in this case, we required CIG to file revised tariff sheets and to make refunds based on those tariff sheets. However, we expressly noted that the minimum bill issue had been severed and that the order was without prejudice to any finding or order we might make subsequently in this or any other proceeding concerning CIG. So, CIG's rates are still subject to refund insofar as the minimum commodity bill is concerned. And therefore, relief from CIG's unjust and unreasonable minimum bill can be retrospective.

The Commission today is issuing a final rule on minimum bills in Docket No. RM83-71-000 which would require all pipelines to eliminate variable costs from their minimum commodity bill. Our decision in this case is fully consistent with the rule issued.

The Commission orders:

(1) The initial decision issued on October 18, 1983, in this proceeding is affirmed to the extent it is consistent with the order.

(2) Within 75 days of the date hereof, CIG shall modify the minimum bill provisions of its H-1 and F-1 rate schedules to eliminate collection of the variable cost competent of the commodity charge.

(3) Within 30 days of the Commission's approval of CIG's amended tariff, CIG shall refund all amounts collected under its present minimum bill in excess of the level approved herein with interest determined in accordance with § 154.67(d) of the Commission's Rules and Regulations (18 C.F.R. § 154.67(d). Within 15 days thereafter, CIG shall file a report with the Commission showing the computation of the refunds and interest paid.

Docket No. RP82-54-011

COLORADO INTERSTATE GAS COMPANY

ORDER DENYING REHEARING

(Issued July 23, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa and Oliver G. Richardson III.

In an order issued on May 25, 1984 [27 FERC ¶ 61,315], we found that the minimum bill provision in Colorado Interstate Gas Company's (CIG) tariff under which it serves Natural Gas Company of America was not just and reasonable. The tariff provided that Natural must pay the full commodity charge on a minimum of 90 percent of its contract quantity even if it actually takes less than that amount. The commodity charge recovers both fixed and variable costs. We directed CIG to modify its minimum bill to Natural to eliminate collection of the variable cost component of the commodity charge. We also ordered that this modification should be made retrospective to the time CIG's rates in this docket became effective. CIG accepts our decision insofar as we directed the pipeline to modify its minimum bill. But it seeks rehearing of the requirement that its minimum bill be modified retrospectively. We deny rehearing.

Essentially CIG argues that the Commission erred in examining the minimum bill provision under section 4 [1]

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[1] Section 4 of the NGA requires all rates charged by a natural gas company to be just and reasonable. It also requires natural gas companies to file tariffs with the Commission showing the rates they

of the Natural Gas Act (NGA). Instead, according to CIG, the Commission should have reviewed the tariff under section 5,[2] where it is prohibited from modifying the tariff retrospectively. CIG's argument rests on the ground that the service agreement containing the minimum bill provision was accepted by the Commission, without suspension or refund obligation, after CIG filed for increased rates in this proceeding. And, the Commission's action in accepting the service agreement, including the minimum bill, negated the Commission's section 4 authority over the minimum bill. The critical procedural history cited by CIG is this: CIG filed a general rate increase in this docket on March 29, 1982. On April 28, 1982 [19 FERC ¶ 61,071], the Commission suspended the increase until September 29, 1982. A partial settlement was then accepted by the Commission on March 10, 1983 [22 FERC ¶ 61,330], which settled all issues but that of the minimum bill. However, the proposed tariff sheets filed by CIG on March 29, 1982, did not include the minimum bill provision. The minimum bill was contained in a service agreement between CIG and Natural which was executed on July 27, 1982, and which was accepted by the Commission to become effec-

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charge. The Commission, whenever a tariff is filed, is authorized to investigate the lawfulness of the rates contained in the tariff and to suspend the operation of the tariff for a period not to exceed five months. Upon completion of the investigation, the Commission may prescribe just and reasonable rates which become effective retroactive to the time the suspension period expired. The Commission may also order the natural gas company to refund, with interest, that portion of the filed rates charged by the company after the suspension period expired which the Commission found was not justified.

[2] Section 5 of the NGA provides that, whenever the Commission, after a hearing had upon its own motion or upon complaint, finds a rate to be unjust or unreasonable, it may determine the just and reasonable rate "to be thereafter observed". Thus, under section 5, rates established by the Commission became effective prospectively only.

tive on September 29, 1982. The service agreement was not suspended, and no refund conditions were attached to it.

We reject CIG's argument. The extent to which the Commission has section 4 authority to review CIG's minimum bill was considered by the administrative law judge when he ruled on the question of whether CIG or Natural had the burden of proof in this proceeding. We adopted his ruling in our May 25, 1984 order, and we believe the reasoning he used is applicable here. Essentially, the Commission has authority to review an existing rate practice in a section 4 proceeding when the existing practice is an integral part of the manner in which the rate is charged. *See, Laclede Gas Co. v. F.E.R.C.*, 670 F.2d 38 (5th Cir. 1982); *Cities of Batavia v. F.E.R.C.*, 672 F.2d 64 (D.C. Cir. 1982); *North Penn Gas Co. v. F.E.R.C.*, 707 F.2d 763 (3rd Cir. 1983). In our view, CIG's minimum bill provision clearly meets this test. A provision which requires a purchaser to pay for gas whether or not it is taken is integral to a determination of whether the overall revenue level is just and reasonable.

Thus, to this point, there is no question that we have authority to review CIG's minimum bill under section 4 of the NGA. And, if we find the minimum bill to be unjust and unreasonable, we may order CIG to refund, with interest, all revenues collected under the minimum bill, retroactive to the time CIG's rates in this proceeding became effective.

The issue then becomes whether our acceptance, without suspension or refund obligation, of the minimum bill clause in CIG's service agreement, after we suspended CIG's general rate increase, dissolves our authority. It does not. The service agreement which CIG executed on July 27, 1982, and which the Commission accepted, was the culmination of an application CIG filed, on

March 31, 1981, in Docket No. CP81-260-000, for a certificate of public convenience and necessity under section 7(c) of the NGA for authorization to increase its service to Natural and other customers. We issued the requested certificate to CIG on June 24, 1982, and directed the pipeline to file amended service agreements reflecting the new service.

Neither CIG's application nor the certificate we issued dealt with the question of a minimum bill. CIG's minimum bill was not an issue in the proceeding. The focus of our attention was whether the new service requested by CIG was in the public convenience and necessity. The service agreement CIG and Natural executed on July 27, 1982, merely carried forward the minimum bill clause contained in the previous service agreement between the two. Under these circumstances, our acceptance of the service agreement cannot be taken as an acceptance of the minimum bill clause as just and reasonable under section 4 of the NGA. We were merely acting to permit Northern to implement its new service.

The Commission orders:

CIG's application for rehearing is denied.

APPENDIX D

15 U.S.C. § 717c:

Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public.

Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any

amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

15 U.S.C. § 717d:

Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Com-

mission may order a decrease where existing rates are unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

MOTION FILED
OCT 29 1986

No. 86-522

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR INTERSTATE PIPELINES

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IN THE

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OCTOBER TERM, 1986

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION OF INTERSTATE PIPELINES FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Tennessee Gas Pipeline Company, a Division of Tenneco Inc.; Algonquin Gas Transmission Company; ANR Pipeline Company; East Tennessee Natural Gas Company; Florida Gas Transmission Company; Great Lakes Gas Transmission Company; Midwestern Gas Transmission Company; Northern Natural Gas Company, Division of Enron Corporation; Northwest Central Pipeline Corporation; Northwest Pipeline Corporation; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Transcontinental Gas Pipe Line Corporation; and Transwestern Pipeline Company (Interstate Pipelines) hereby respectfully move for leave to file the attached Brief *Amici Curiae* in support of the petition for writ of certiorari (Petition) in this case.

I.

INTERESTS OF INTERSTATE PIPELINES

Interstate Pipelines are natural gas pipeline companies engaged in the interstate transportation and sale of natural gas subject to the jurisdiction of Respondent, Federal Energy Regulatory Commission (FERC or Commission) under the Natural Gas Act (NGA), 15 U.S.C. § 717, *et seq.* Interstate Pipelines sell gas in 42 states with an aggregate total rate base of more than eight billion dollars. During 1985, Interstate Pipelines transported and sold about eight trillion cubic feet of gas, serving numerous customers that, in turn, supply natural gas to millions of ultimate residential, commercial and industrial gas consumers.

Interstate Pipelines' rates for the transportation and sale of natural gas are regulated by the Commission pursuant to authority granted under Sections 4 and 5 of the NGA, 15 U.S.C. § 717c and § 717d, respectively. The question presented here relates to whether the Commission properly acted under Section 4 rather than Section 5 of the NGA in its decision on a rate change filing of Petitioner, Colorado Interstate Gas Company (CIG). This issue will similarly affect Interstate Pipelines, other interstate pipeline companies, their wholesale customers and the ultimate consumers of natural gas on a recurring basis each time any interstate pipeline makes a NGA Section 4 rate change filing with the Commission. The Tenth Circuit's sanction of the Commission's exercise of retroactive ratemaking establishes a new and conflicting precedent that will undoubtedly be invoked by the Commission in connection with its continuing NGA Section 4 review of any "proposed change of rate, charge, classification, or service" filed by an interstate pipeline company (App. D at 27a). Interstate Pipelines thus have a real and vital interest in the expeditious resolution of this issue via review by this Court.

II.

POSITION OF THE PARTIES

The written consents to filing of the attached Brief *Amici Curiae* of Petitioner and all Respondents except Natural Gas Pipeline Company of America (Natural) and its customers, The Peoples Gas Light & Coke Company (Peoples) and North Shore Gas Company (North Shore), have been obtained and are attached to the original of this motion filed with this Court. Significantly, those parties not consenting to the filing of the attached Brief *Amici Curiae* (Natural and its customers) realize a direct pecuniary benefit from the Tenth Circuit's affirmance of the FERC's retroactive elimination of the specific minimum bill provision in CIG's tariff with Natural.[1] While the Petition and attached Brief *Amici Curiae* of necessity challenge that specific result by seeking review by this Court, Interstate Pipelines are more broadly concerned with the conflicting precedent established by the Tenth Circuit's sanction of the Commission's exercise of retroactive ratemaking under Section 4 of the NGA and the negative implication of that precedent for the interstate natural gas industry and the proper and efficient administration of the NGA.

III.

CONSIDERATION OF INTERSTATE PIPELINES' BRIEF *AMICI CURIAE* WILL ASSIST THE COURT'S REVIEW

Given their significant role in the interstate gas pipeline industry and the likely recurring regulatory impact of the precedent below on their operations and interstate gas consumers, Interstate Pipelines submit they are uniquely situated to assist the Court in its deliberations on

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[1] As recognized by the Tenth Circuit below, the Commission's retroactive elimination of the minimum bill precluded CIG from collecting approximately $20 million from Natural (App. A at 4a). Had these charges been recovered from Natural, Natural's customers, including Peoples and North Shore, would have paid these costs through Natural's rates.

the Petition through the submission of the attached Brief *Amici Curiae*. Interstate Pipelines' industry-wide perspective and extensive experience with regulation under the NGA will help assure that the Court is fully apprised of all aspects of the important question presented.

WHEREFORE, Interstate Pipelines respectfully request the Court to grant this motion and to accept and consider their attached Brief *Amici Curiae* in support of the Petition in this case.

Respectfully submitted,

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IN THE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICI CURIAE FOR INTERSTATE PIPELINES

This Brief *Amici Curiae* is filed pursuant to Rule 36 in support of the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit (Petition) filed by Colorado Interstate Gas Company (CIG) on September 29, 1986.

INTEREST OF THE INTERSTATE PIPELINES IN GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.; Algonquin Gas Transmission Company; ANR Pipeline Company; East Tennessee Natural Gas Company; Florida Gas Transmission Company; Great Lakes

Gas Transmission Company; Midwestern Gas Transmission Company; Northern Natural Gas Company, Division of Enron Corporation; Northwest Central Pipeline Corporation; Northwest Pipeline Corporation; Texas Eastern Transmission Corporation; Texas Gas Transmission Corporation; Transcontinental Gas Pipe Line Corporation; and Transwestern Pipeline Company (Interstate Pipelines) are natural gas pipeline companies engaged in the interstate transportation and sale of natural gas subject to the jurisdiction of Respondent, Federal Energy Regulatory Commission (FERC or Commission) under the Natural Gas Act (NGA), 15 U.S.C. § 717, *et seq.* Interstate Pipelines sell gas in 42 states with an aggregate total rate base of more than eight billion dollars. During 1985, Interstate Pipelines transported and sold about eight trillion cubic feet of gas, serving many customers that, in turn, supply natural gas to millions of ultimate residential, commercial and industrial gas consumers.

Interstate Pipelines' rates for the transportation and sale of natural gas are regulated by the Commission pursuant to Sections 4 and 5 of the NGA, 15 U.S.C. § 717c and § 717d, respectively. The question presented here relates to whether the Commission properly acted under Section 4 rather than Section 5 of the NGA in its decision on a rate change filing of Petitioner, CIG. This issue will similarly affect Interstate Pipelines, other interstate pipeline companies, their wholesale customers and the ultimate consumers of natural gas on a recurring basis each time any interstate pipeline makes a NGA Section 4 rate change filing with the Commission. The Tenth Circuit's affirmance of the Commission's retroactive elimination of a long-standing tariff "minimum bill" provision that CIG did not propose to change raises a significant issue requiring resolution by this Court. Moreover, that court's sanction of the Commission's retroactive rate order establishes a precedent that will undoubtedly be invoked by the Commission in connection with its continuing NGA Section 4 review of any "proposed change

of rate, charge, classification, or service" filed by an interstate pipeline company (App. D at 27a). That precedent, however, squarely conflicts with the decisions of other Courts of Appeals on the same issue and with applicable decisions of this Court. Because resolution of the question presented by the Tenth Circuit's decision below is essential to the proper, future administration of the NGA, Interstate Pipelines submit this Brief *Amici Curiae* in support of the Petition.

SUMMARY OF ARGUMENT

The Petition should be granted so that this Court may review an important issue central to the interpretation and enforcement of the NGA. Resolution of this issue by this Court is essential to the proper, future administration of the NGA as it affects the entire natural gas industry and interstate gas consumers.

The decision of the Court of Appeals for the Tenth Circuit below is in direct conflict with decisions of the Courts of Appeals for the District of Columbia and Fifth Circuits and with decisions of this Court that have recognized the statutory limitation on the Commission's authority in NGA Section 4 proceedings to impose retroactively changes in rates or tariff provisions not proposed by the natural gas company in its NGA Section 4 filing. Until resolved by this Court, the issue thus created will continue to arise in nearly every interstate pipeline company rate case before the Commission. Indeed, the uncertainty and divisiveness engendered by this conflict can only harm the natural gas industry and gas consumers and impede the appropriate and efficient administration of the NGA.

ARGUMENT

I. The Petition Should Be Granted To Resolve The Conflict Between The Circuits And The Conflict With The Decisions Of This Court

While the facts of the case below concerned the retroactive elimination of a "minimum bill provision" in CIG's filed tariff for sales to Natural Gas Pipeline Company of America (Natural), the Tenth Circuit's approval of the Commission's action in eliminating that provision retroactively was necessarily and by its very language an extremely broad ruling (App. A at 6a-7a) (citations omitted; emphasis supplied):

> The filing of new rates by a natural gas company triggers Commission review under § 4. In a § 4 proceeding, the gas company has the burden of justifying its newly filed rates. If the gas company fails to show that its increased rates are just and reasonable, the Commission modifies the rates. This modification may be made retroactive through the Commission's refund power to the date the increased rates became effective. . . .
>
> Section 4 of the Natural Gas Act gives the Commission broad authority to scrutinize new rates filed by a gas company to insure that such rates are just and reasonable. The Commission may review a gas company's rate structure to insure *that all parts of the structure—both old and new—operate together to produce just and reasonable rates.* . . . By filing the rate increase, a gas company assumes the risk of having to justify *its entire rate structure, including integral provisions of that structure which the company does not propose to change,* . . . A provision which serves as a charging mechanism is considered an integral part of a rate increase and a gas company's rate structure. . . .

Thus, in upholding the Commission's retroactive elimination of a long-standing minimum bill tariff provision which was "neither altered nor mentioned" in CIG's rate

filing under NGA Section 4, the Tenth Circuit found sweeping authority under that section for the Commission to review and eliminate retroactively to the date the filed rates became effective a filing pipeline's "entire rate structure . . . including integral provisions of that structure which the company does not propose to change" (App. A at 2a, 6a) (citations omitted).

As shown in the Petition (at 5-9), the decision of the Tenth Circuit below is in clear and direct conflict with decisions of the Courts of Appeals in both the District of Columbia and Fifth Circuits holding that the Commission must act on a prospective basis pursuant to the authority of NGA Section 5, not retroactively under Section 4, where the Commission seeks to modify an existing tariff provision that the pipeline itself has not proposed to change.

Where the Tenth Circuit below found Section 4 review and retroactive modification appropriate if the unchanged minimum bill provision "is integral to the rate structure of CIG" (App. A at 7a), the District of Columbia Circuit has consistently rejected the Commission's use of such Section 4 powers as to "any change in a ratemaking component" or "rate methodology" not proposed by the natural gas company. *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182, 186 (D.C. Cir. 1986) (quoting *Public Service Commission of New York* v. *FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1979), *cert. denied*, 454 U.S. 879 (1981)). The District of Columbia Circuit's interpretation has been followed by the Fifth Circuit Court of Appeals. *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d 509, 523 (5th Cir. 1981) ("Because the pipeline had not requested a change in its cost allocation method, the Commission could not impose such a change without following the Section 5(a) procedures."). Under these decisions, a change not proposed by the pipeline company can only be made pursuant to proper proceedings under Section 5, which does not allow *retroactive* change. *See City of*

Willcox v. *FPC*, 567 F.2d 394, 402 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

The Petition should be granted to resolve this conflict between the circuits and promote uniform interpretation and application of the NGA. *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 37, *reh'g denied*, 377 U.S. 974 (1964) ("We granted [certiorari] because of an apparent conflict between that [Tenth Circuit] decision and [a case] decided by the Court of Appeals for the Ninth Circuit.").

The Petition should be granted for the further reason that the Tenth Circuit's decision below is inconsistent with this Court's prior construction of Sections 4 and 5 of the NGA. This Court's decisions establish principles which compel the conclusion that the Commission's authority to modify existing tariff provisions *not proposed to be changed by the pipeline company* is prospective only, since such authority arises only under Section 5, and that retroactive application of Commission orders under Section 4(e) may occur only relative to a rate or tariff provision that is changed in the first instance by the interstate pipeline company.

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956), the Court defined the powers of the Commission under NGA Sections 4 and 5 (emphasis supplied):

> The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be "unjust, unreasonable, unduly discriminatory, or preferential." This is neither a "rate-making" nor a "rate-changing" procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to all the rates of a natural gas company, *whether*

> *long-established or newly changed*, but in the *latter case* the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a *newly changed rate or contract* (except "industrial" rates), the further powers (1) to preserve the status quo pending review of the *new rate* by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the *change* became effective.

Similarly, in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 644-45 (1972), after noting that a Commission order under Section 5(a) "can have only prospective application" the Court found that under Section 4 (emphasis supplied):

> a pipeline's *tariff amendments* filed with the FPC go into effect in 30 days unless suspended by the Commission. If a filing is challenged or the FPC of its own motion deems it appropriate, it may suspend the *amended tariff* for up to five months, at the end of which time the *amended tariff* becomes effective pending the completion of hearings.[1]

This Court's prior decisions thus clearly support the conclusion that the Commission's power under NGA Section 4 to suspend and retroactively modify, by means of its refund authority, rates and pipeline tariff provisions is limited to *changes* or *amendments* in the rates or tariffs made by the pipeline company.

The Tenth Circuit below maintained that this Court's decision in *FPC* v. *Tennessee Gas Transmission Co.*, 371

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[1] Likewise, this Court has determined the Commission has no power to alter a rate retroactively under NGA Section 5 "[because Section 5] bars 'the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.'" *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 579 (1981). *See also FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 153 (1962). Thus, it is clear that the NGA's proscription against retroactive ratemaking protects both the company and consumer alike.

U.S. 145 (1962), stands for the proposition that the filing of a rate increase subjects the pipeline company's "entire rate structure" to retroactive modification by the Commission under Section 4(e). However, it is clear that the Court's decision in *Tennessee Gas* was concerned with the rate change initiated by Tennessee and not with unchanged provisions of Tennessee's tariff. *See*, 371 U.S. at 152. That decision thus provides no support for the Tenth Circuit's decision below.

II. The Petition Should Be Granted To Insure The Proper And Efficient Administration Of The Natural Gas Act

Equally significant to and supportive of the Petition is the need to insure proper administration of the NGA. The Commission's erroneous position that it may exercise Section 4 authority to modify *retroactively* a previously approved tariff provision that the natural gas pipeline company does *not* propose to change—consistently rejected until now by the Courts of Appeals—can only gain vitality as a result of the Tenth Circuit's affirmance of that position below. Indeed, certain parties have already relied on the Tenth Circuit's decision below during proceedings in several recent rate cases before the Commission.

As it has done on prior occasions, this Court should grant the Petition and review the decision of the Court of Appeals in order to resolve this important issue and provide the guidance required to insure the appropriate, future administration and enforcement of the NGA. *See FPC* v. *Hunt*, 376 U.S. 515, 517 (1964); *Wisconsin* v. *FPC*, 373 U.S. 294, 302-03, *reh'g denied*, 375 U.S. 870 (1963); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 147 (1962); and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 337 (1956).

The frequency with which this issue will continue to arise absent resolution by this Court cannot be overstated. The rates charged by all interstate pipeline companies

are regulated by the Commission pursuant to Sections 4 and 5 of the NGA. The issue presented here will arise each time any one of these companies makes a rate change filing.

Under the Commission's Regulations, interstate pipeline companies subject to the Commission's jurisdiction are required to file tariff sheets restating their rates at least once every three years. 18 C.F.R. § 154.38(d)(4)(vi). Over the years, however, has been common for interstate pipeline companies to file rate changes more frequently, particularly during periods when the volumes of gas sold or transported have declined between rate filings and prevented the recovery of Commission-approved rates of return.[2]

The Commission's own Regulations and Section 4 policy thus ensure that the issue arising from the Tenth Circuit's decision below will frequently recur and impact directly and adversely on interstate pipeline companies and the wholesale customers and ultimate consumers served by those pipelines. It is essential that this Court grant the Petition and review the decision of the Court of Appeals below "because of the importance of this case

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[2] For instance, during the period of natural gas curtailment in the 1970s, interstate pipelines typically filed rate changes pursuant to Section 4 as frequently as twice annually. *See*, FPC Ann. Rep. to Congress, App. D, Table 3—Pipeline Rate Changes, 1961-77 (1977). In this regard, it is possible that the uncertainty as to interstate pipeline sales and transportation volume levels created by Commission Order Nos. 380, *et seq.* (FERC Stat. & Reg. (CCH) Order No. 380, ¶ 30,571; Order No. 380-A, ¶ 30,584; Order No. 380-C, ¶ 30,607 (1984)); Order Nos. 436 *et seq.* (FERC Stat. & Reg. (CCH) Order No. 436, ¶ 30,665; Order No. 436-A, ¶ 30,675 (1985)); and Order No. 451 (FERC Stat. & Reg. (CCH) ¶ 30,701 (1986)) may result in the same frequency of pipeline rate filings in the future. Indeed, in Order No. 436 the Commission recognized that customer reductions of firm sales entitlements under that order, which are permitted once each year, could make it "necessary for the pipeline to file a rate case to spread the difference [in costs] over all firm sales and transportation services." Order No. 436, FERC Stat. & Reg. (CCH) ¶ 30,665 at 31,522 (1985).

in the administration and future operation of the Natural Gas Act." *Wisconsin* v. *FPC*, *supra*, 373 U.S. at 302-03.

CONCLUSION

For the foregoing reasons, Interstate Pipelines support the petition for a writ of certiorari and urge the Court to grant the Petition and, upon due consideration, reverse the decision of the Court of Appeals.

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No. 86-522

FILED
OCT 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1986

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT NATURAL GAS PIPELINE COMPANY OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals erred in affirming a holding by the Federal Energy Regulatory Commission (''FERC''or ''Commission'') that, with respect to the rate structure of a Natural Gas Pipeline Company, Colorado Interstate Gas Company (GIG), which had filed for increased rates, FERC could modify, as of the date of the revised rates became effective, existing tariff provisions which are part of GIG's rate design and are integral to the collection ot the revised rates.

STATUTES INVOLVED

Relevant portions of the Natural Gas Act, 15 U.S.C. §717 (Act), are included in the Appendix to CIG's Petition for Writ of Certiorari.

STATEMENT OF FACTS

The Petitioner, CIG, is an interstate natural gas transmission pipeline. CIG transports, and makes sales for resale, of natural gas in interstate commerce, serving Natural Gas Pipeline Company of America (''Natural'') and others. Such sales and transportation are subject to the jurisdiction of the Commission under the Act. Respondent Natural, which was an active Intervenor before the Commission and the United States Court of Appeals for the Tenth Circuit (Tenth Circuit), is also an interstate pipeline company subject to the Act. Natural purchases a portion of its natural gas supplies from CIG under CIG's Rate Schedules F-1 AND H-1 on file with the Commission. The Commission is a federal agency which is charged with the responsibility of regulating natural gas pipeline rates, charges and services (including CIG's sales to Natural under Rate Schedules F-1 and H-1) pursuant to the Act.

The minimum commodity bill at issue here is a component of CIG's rate structure under Rate Schedules H-1 and F-1 governing service to Natural. This provision required Natural to take-or-pay for ninety percent (90%) of the volume of gas to which it is contractually entitled.

On March 29, 1982, CIG initiated a general rate increase proceeding with the Commission pursuant to §4 of the Act, 15 U.S.C. §717c. This rate increase affected, *inter alia*, the rates charged to Natural under CIG's Rate Schedules H-1 and F-1. By order issued April 28, 1982, the Commission suspended the proposed rate increase until September 29, 1982, at which time the new rates became effective subject to refund. *Colorado Interstate Gas Co.*, 19 FERC ¶61,701.

On May 25, 1984, the Commission issued the order under review here, which held that CIG's minimum commodity bill as then in effect was not just and reasonable. *Colorado Interstate Gas Co.*, 27 FERC¶61,315. The Commission ordered CIG to modify the minimum commodity bill to preclude the collection of gas costs and other variable costs. The Commission made this ruling effective as of September 29, 1982, the date CIG's rate increase had become effective subject to refund. The Commission denied CIG's request for rehearing by order issued July 23, 1984. *Colorado Interstate Gas Co.*, 28 FERC ¶61,083. CIG appealed these orders to the U.S. Court of

of Appeals for the Tenth Circuit, which affirmed the Commission in full. That ruling by the Tenth Circuit is the subject of CIG's Petition for Certiorari.

SUMMARY OF REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari in this matter raises no issue warranting review by this Court. The extent of Commission's authority to review CIG's tariff provision incorporating its minimum commodity bill under §4 of the Act relates to the particular facts and circumstances present here, which were thoroughly reviewed by the Commission and the Tenth Circuit. No industry-wide issue is present.

Moreover, the Tenth Circuit's decision is fully consistent with interpretation of the Act by this Court and by other circuits. This Court has stated that a pipeline such as CIG filing a §4 rate proceeding assumes the risk of any change in rate design ordered by the Commission (such as the modification of the minimum commodity bill required here).

Other circuits have ruled that the Commission may review under §4 any tariff provision which interacts with the revised rate. The D.C. Circuit itself, which CIG contends has issued a decision in conflict with the order under review, has clearly so held and the case on which CIG relies--which involved two *separate* rates--is clearly distinguishable.

REASONS FOR DENYING THE PETITION

This appeal presents a narrow and fact-specific question as to whether the Commission exceeded its authority in a routine rate review by the Commission under §4 of the Act. The facts and circumstances surrounding the Commission's actions were fully and adequately reviewed by both the Commission and the Tenth Circuit. This Court and other circuits have affirmed the Commission's exercise of its §4 authority in similar circumstances. CIG has failed to present any arguments to justify review of this matter in which the Tenth Circuit merely applied recognized legal principles developed under the Act to the facts and circumstances of a particular case.

I. The Tenth Circuit's Decision is Fully Consistent With This Court's Rulings Regarding Commission Authority.

At issue here is a routine exercise of the Commission's authority under §4 of the Act. The Commission ruled that, in reviewing CIG's filing, it could also review and modify an existing tariff provision -the minimum commodity bill - which is integral to collection of the revised rate. The integral nature of this provision was explicitly found by the FERC and affirmed by the Tenth Circuit. CIG does not take issue with that finding here. To the extent Natural takes less gas than its minimum commodity bill level (which is the current situation), CIG can only collect its rates from Natural through the minimum commodity bill.

The Commission's review authority under §4 extends to any tariff provision that interacts with, or is integral to, the charging of the revised rates sought by the pipeline. Precedent before this Court and the various circuits support this proposition. This result is also consistent with the primary aim of the Act which is "to protect consumers against exploitation at the hands of natural gas companies..." and "to afford consumers a complete, effective bond against excessive rates and charges..." *Sunray Mid-Continental Oil Co. v. FPC*, 364 U.S. 137, 147 (1960), quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

This Court has held in *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), that a natural gas company filing under §4 of the Act assumes the risk of a change in rate design. Therefore, the Tenth Circuit decision upholding the Commission's ruling that modified the minimum commodity bill, an integral part of CIG's rate design, presents no question which is novel or poses a conflict with existing interpretation of the Act by this court.

In *Tennessee*, the Commission had ordered an interim rate reduction and refunds under §4 and left for future proceedings a determination of the pipeline's rate design ¢ specifically, the cost allocation among zones on a pipeline system divided into six separate geographic zones with separate rates. The pipeline objected on the grounds that if the Commission were to modify the rate design in subsequent proceedings, the pipeline might be unable to collect the cost of service allowed. This Court upheld the Commission's order on the grounds that, in filing a §4 case, the company assumed the risk inherent in a reexamination of its rate design. This Court stated in *Tennessee* (371 U.S. at 152-153):

> ...In addition, an analysis of the policy of the Act clearly indicates that a natural gas company initiating an increase in rates under §4(d) assumes the hazards involved in that procedure. It bears the burden of establishing its rate schedule as being "just and reasonable"...The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.

Thus, under *Tennessee*, the Commission has plenary authority pursuant to §4 of the Act to review and modify the design (which includes the minimum commodity bill) of a pipeline's rates which are involved in a §4 rate filing even if the pipeline itself has proposed no change in rate design but only in the overall level of rates.

Regulation of natural gas and administration of the Act are entrusted to the administrative expertise of the Commission. *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 617 (1944). The Commission also is accorded

deference as to its interpretation of its own orders and regulations issued pursuant to the Act and indeed to interpretation of the Act itself. *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984). *Mississippi Valley Gas Co. v. FPC*, 294, F.2d 588, 592 (5th Cir. 1961); *Signal Oil and Gas Co. v. FPC*, 238 F.2d 771, 774 (3rd Cir. 1956) *cert. denied*, 353 U.S. 922. Where, as here, the Commission's order has been affirmed by a Court of Appeals and is fully consistent with prevailing principles as expressed by this Court, no basis has been shown to warrant further review.

II. The Tenth Circuit Decision Is Consistent With Precedent From Other Circuits.

Other circuits have, consistent with this Court's ruling in the *Tennessee* case, held that a natural gas company filing revised rates assumes the risk of justifying any tariff provision or rate methodology which is an integral part of its rate structure, whether or not the filing company proposed a change in that aspect of the rate structure. *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984); *North Penn Gas Co. v. FERC*, 707 F.2d 763 (3rd Cir. 1983); *Cities of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982); *Laclede Gas Co. v. FERC*, 670 F.2d 38 (5th Cir. 1982).

In *North Penn*, the Third Circuit held that when "the company precipitated the rate examination by its §4 filing," the Commission was empowered under §4 to review and require a change in an existing rate methodologies which was an intergral part of the development of the revised rate (in that case, the method of valuing storage gas inventory) even though the company proposed no change in that methodology (707 F.2d at 769).

In *Batavia*, the D.C. Circuit held that the Commission has authority to review an existing fuel adjustment clause in conjunction with a filing of revised rates under §205[1] of the Federal Power Act (which corresponds to §4 of the Natural Gas Act)[2] The *Batavia* Court stated:

> ...It is not difficult to envision many situations where the interaction between a fuel adjustment clause and new components of a revised rate will make the operation of the clause itself unjust or unreasonable. If that happens, we cannot conceive that the Commission would be unable to subject the fuel adjustment clause to its suspension and refund authority. We certainly can find nothing - and the Commission has cited

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[1] 16 U.S.C. §824d(e).

[2] Parallel provisions in the NGA and the Federal Power Act are to be read in *pari materia*. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

> nothing - to command such an unlikely result. We are aware that this court recently rejected the notion that simply 'because a company files for higher rates, it bears the burden of proof on those portions of its filing that represent no departure from the status quo. *Transcontinental Gas Pipeline Corp. v. Federal Energy Regulatory Commission, 642 F.2d 1335, 1345 (D.C. Cir. 1980) (hereinafter Transco).* But we do not read *Transco* as precluding the Commission from reviewing a revised rate completely to assure that all its parts - old and new - operate in tandem to insure a 'just and reasonable' result and from ordering refunds if the previously approved fuel clause operates with new provisions to produce an over-recovery....

(672 F.2d at 76-77).

It is clear from this language that in *Batavia* the D.C. Circuit recognized Commission authority to subject to §4 review a tariff provision which interacts with the company's revised rates.

Similarly, the Fifth Circuit has stated in *Laclede*:

> We hold that when United filed pursuant to §4 to increase its rates, it assumed the hazard and opened to Commission scrutiny the propriety of the PGA clause contained within its rate schedule... Furthermore, where the PGA mechanism is such an integral part of the manner in which rates are charged, when the very rates being charged are allocated by application of the PGA clause, its provisions are necessarily a part of a filing for new rates subject to §4 scrutiny.

(670 F.2d at 41-42).

Natural would submit that the Tenth Circuit summarized the law both accurately and succinctly in its order challenged here by CIG (791 F.2d at 807):

> Section 4 of the Natural Gas Act gives the Commission broad authority to scrutinize new rates filed by a gas company to insure that such rates are just and reasonable. The Commission may review a gas company's rate structure to insure that all parts of the structure - both old and new - operate together to produce just and reasonable rates. *See City of Batavia v. Federal Energy Regulatory Comm'n* 672 F.2d 64, 75-77 (D.C. Cir. 1982) (dealing with a similar section of the Federal Power Act, 16 U.S.C. §824d(e)). By filing the rate increase, a gas company assumes the risk of having to justify its entire rate structure, *see Federal Power Comm'n v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152, 83 S. Ct. 211, 215, 9 L.Ed.2d 199 (1962), including integral provisions of that structure which the company does not propose to change, *Florida Gas Transmission Co. v. Federal Energy Regulatory Comm'n*, 741 F.2d 1307, 1311 (11th Cir. 1984); *North Penn Gas Co. v. Federal Regulatory Comm'n*, 707 F.2d 763, 769 (3d Cir. 1983); *City of Batavia V. Federal Energy Regulatory Comm'n*, 672 F.2d at 75-77; *Laclede Gas Co. v. Federal Regulatory Comm'n*, 670 F.2d 38, 41-42 (5th Cir. 1982). A provision which serves as a charging mechanism is considered an integral part of a rate increase and a gas company's rate structure. *Cf. Laclede Gas Co. v. Federal Energy Regulatory Comm'n*, 670 F.2d at 41-42 (finding a purchased gas adjustment clause is necessarily a part of a new rate filing, and thus subject to §4 scrutiny, because it is 'an integral part of the manner in which rates are charged').

III. The Tenth Circuit's Decision Is Distinguishable From *Sea Robin*

CIG relies primarily upon *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182 (D.C. Cir. 1986) in support of its position that a conflict exists between the circuits. In fact, the holding in *Sea Robin* does not contradict the decision of the Tenth Circuit in this matter.

First, the D.C. Circuit in *Sea Robin* explicitly disclaimed any intention of overruling its prior precedents, including the *Batavia* case discussed in the previous section. As the D.C. Circuit stated: "City of Batavia neither contradicts nor limits our interpretation of Transco." (795 F.2d at 187). As noted in the previous section, the D.C. Circuit in *Batavia* clearly endorsed §4 review of a tariff provision which interacts with the revised rates.

Second, *Sea Robin* is readily distinguishable on its facts and circumstances. In *Sea Robin*, the Commission had ordered the allocation of additional costs to, and a corresponding change in the rate level for, a transportation service the rate for which the company had not proposed to change. This allocation resulted in lower rates for other services so that refunds were required of the company. *Sea Robin* did not involve, as does this case, a mechanism such as a minimum commodity bill required for the collection of a rate the company has

commodity bill required for the collection of a rate the company had proposed to revise. In other words, there was no interaction between the revised rates and an existing tariff provision which determined the actual charges as in *Batavia* or in this case. Instead, *Sea Robin* dealt with two separate rates, only one of which the company had proposed to change. Whether the D.C. Circuit in *Sea Robin* has unduly restricted the Commission's §4 authority may be an interesting question, but it is an irrelevant one here, since the D.C. Circuit's holding does not conflict with that rendered by the Tenth Circuit here.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

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Dated: October 30, 1986

2719i

Supreme Court, U.S.
FILED
DEC 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-522

In the Supreme Court of the United States

OCTOBER TERM, 1986

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), authorized the Federal Energy Regulatory Commission to order petitioner to refund to its customers the portion of a rate increase that the Commission found unlawful.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-522

COLORADO INTERSTATE GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 791 F.2d 803. The opinion of the Federal Energy Regulatory Commission (Pet. App. 17a-21a) is reported at 27 F.E.R.C. ¶ 61,315. The Commission's order denying rehearing (Pet. App. 22a-25a) is reported at 28 F.E.R.C. ¶ 61,083.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1986, and a petition for rehearing was denied on July 2, 1986 (Pet. App. 16a). The petition for a writ of certiorari was filed on September

29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Act, 15 U.S.C. 717 *et seq.*, empowers the Federal Energy Regulatory Commission to regulate the rates charged by natural gas pipelines for sales of natural gas. Section 4 of the Act, 15 U.S.C. 717c, governs the Commission's review of pipelines' rate changes. It provides that, upon the filing of a new rate schedule, the Commission may "enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service" (15 U.S.C. 717c(e)). The Commission may suspend the operation of the new rate schedule for up to five months; the schedule may then go into effect, but the Commission may require the pipeline company "to refund, with interest, the portion of such increased rates or charges by its decision found not justified" (*ibid.*). The statute states that "the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company" (*ibid.*).

The Commission's authority over natural gas rates is not limited to reviewing rate changes. Section 5(a) of the Act, 15 U.S.C. 717d(a), states that "[w]henever," after a hearing, the Commission finds that a rate, charge, classification, rule, practice, or contract is "unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." The Commission has no authority to order retrospective relief in a proceeding under Section

5(a); "the rate found by the Commission to be just and reasonable becomes effective prospectively only" (*Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378, 389 (1959)).

2. Petitioner is an interstate natural gas pipeline company whose rates are regulated by the Commission under the Natural Gas Act. Natural Gas Pipeline Company of America (NGPCA) is one of petitioner's principal customers. NGPCA purchases natural gas from petitioner under two different rate schedules: one schedule governs petitioner's field sales (the F-1 rate) and another, higher, schedule applies to sales from petitioner's main pipeline (the H-1 rate). As the court of appeals explained, "[e]ach rate has two components, a commodity charge and a demand charge. The commodity charge includes all variable costs (mainly the cost of the gas) plus certain fixed costs. The demand charge includes all fixed costs not allocated to the commodity charge" (Pet. App. 2a). The commodity charge component of these two rates included a minimum bill provision requiring NGPCA "to take or pay for 90% of the volume of gas to which it is contractually entitled" (*ibid.*). The minimum bill provision, which was contained in a service agreement between petitioner and NGPCA, essentially established a minimum commodity charge, requiring NGPCA to pay the specified amount for the gas even if it did not take delivery of that quantity of gas during the relevant time period. The provision stated that charges incurred for failure to take the specified minimum quantity of natural gas would be calculated on the basis of the lower F-1 rate. *Ibid.*

In March 1982, petitioner filed revised tariffs with the Commission pursuant to Section 4 of the Natural

Gas Act that, among other things, increased both of the rates charged to NGPCA. Petitioner did not propose any change in the minimum bill provision. The Commission invoked its authority under Section 4 to suspend the effectiveness of the new rates and ordered a public hearing concerning the lawfulness of those rates. The suspension expired in September 1982; the rates then took effect subject to refund. Pet. App. 2a-3a; *Colorado Interstate Gas Co.*, 19 F.E.R.C. ¶ 61,071 (1982).[1]

Settlement negotiations during the administrative proceedings led to the resolution of all issues except for NGPCA's claim that the minimum bill provision was unjust and unreasonable.[2] Following a hearing, the administrative law judge found that the minimum bill provision was unlawful (*Colorado Interstate Gas Co.*, 25 F.E.R.C. ¶ 63,012 (1983)). The ALJ first determined that "[f]or purposes of reviewing the minimum bill provisions and determining the burden of proof, * * * Section 4 is the applicable provision of the Natural Gas Act" (*id.* at 65013). He noted that one effect of the proposed rate increases would be to raise the charge that petitioner could impose under the minimum bill provision (*id.* at 65015):

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[1] After the new rates went into effect, NGPCA failed to purchase the amount of gas specified in the minimum bill provision, thereby incurring a $20 million deficiency charge. Pet. App. 4a.

[2] The administrative law judge certified this partial settlement to the Commission (*Colorado Interstate Gas Co.*, 22 F.E.R.C. ¶ 63,040 (1983)), and the Commission approved the settlement (*Colorado Interstate Gas Co.*, 22 F.E.R.C. ¶ 61,330 (1983)).

> [T]he proposed rate increase inflates the impact of the minimum bill provisions which are components of the entire rate design. Unlike other aspects of the longstanding service agreement which have no different impact upon a purchaser after a rate increase, the charges which can be collected under minimum bill provisions flex in tandem with a rate increase. Clearly, the minimum bill provisions are an integral part of the rate increase, thereby placing upon [petitioner] the Section 4(e) burden of proving such minimum bill provisions just and reasonable.

On the merits, the ALJ found that "the current 90 percent minimum bill provisions exceed by their terms, the reasonable costs incurred by [petitioner's] service to [NGPCA]. The current provisions are not shown to be the best alternative to achieve the underlying objectives of the provisions." 25 F.E.R.C. at 65018; see also *id.* at 65020-65021. The ALJ found that petitioner was entitled to set its rate so as to ensure recovery of the fixed costs that it incurs in serving NGPCA, but that petitioner was not entitled to recover variable costs through the minimum bill. He therefore directed petitioner to substitute for the minimum bill provision a monthly minimum demand charge covering the fixed costs allocated to the F-1 and H-1 rate schedules. *Id.* at 65021.

3. The Commission upheld the ALJ's conclusion that petitioner's minimum bill provision was unlawful, but disagreed as to the proper remedy (Pet. App. 17a-21a). The Commission stated that its finding that the minimum bill provision was not just and reasonable did "not rest solely on the ground that [petitioner] failed to meet its burden of proof. There is ample evidence in the record demonstrating that

[petitioner's] minimum bill is not just and reasonable" (*id.* at 18a). The flaw in the provision, the Commission concluded, was that it allowed recovery of variable as well as fixed costs; the Commission stated that "a minimum commodity bill limited to recovery of the pipeline's fixed costs would be just and reasonable" (*id.* at 19a).

The Commission found that the monthly demand charge imposed by the ALJ did not appropriately limit the minimum bill to recovering petitioner's fixed costs. It stated that (Pet. App. 19a):

> [T]his goal can be better achieved simply by eliminating variable costs from the minimum bill. This would give [petitioner] an inducement to maintain or increase its sales to [NGPCA] above the contract minimum because [petitioner] could charge the full volumetric rate, including fixed and variable costs, on all gas sold above the contract minimum. And fixed costs include return on equity. The demand charge proposed by the [ALJ], on the other hand, provides no such incentive because it would enable [petitioner] to recover all fixed costs, including full return on equity, allocated to [NGPCA] regardless of the amount of gas * * * purchased.

It therefore ordered petitioner to amend the minimum bill provision to eliminate recovery of variable costs.[3]

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[3] The Commission's determination with respect to this question is consistent with the rule that the Commission adopted on the same date that it issued the decision here, which requires all pipelines to eliminate variable costs from their minimum bill provisions. See *Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), cert. denied, No. 85-1219 (May 19, 1986).

Finally, the Commission concluded that its decision regarding the minimum bill would be retrospective to the date that the suspended rates were placed into effect, and that petitioner therefore was obligated to refund the charges it had collected pursuant to the minimum bill provision. The Commission noted that in accepting the settlement of the other issues in the case it had stated that "the minimum bill issue had been severed and that the [settlement] order was without prejudice to any [subsequent] finding or order" in this proceeding (Pet. App. 20a). It concluded that because petitioner's new rates initially had been suspended pursuant to Section 4(e), "relief from [petitioner's] unjust and unreasonable minimum bill can be retrospective" (Pet. App. 20a).

Petitioner sought rehearing with respect to the Commission's determination that retrospective relief was appropriate. The Commission denied rehearing, rejecting petitioner's claim that the Commission lacked the authority to review the minimum bill provision under Section 4 of the Natural Gas Act (see Pet. App. 22a-25a). The Commission observed that it "has authority to review an existing rate practice in a section 4 proceeding when the existing practice is an integral part of the manner in which the rate is charged. In our view, [petitioner's] minimum bill provision clearly meets this test. A provision which requires a purchaser to pay for gas whether or not it is taken is integral to a determination of whether the overall revenue level is just and reasonable" (*id.* at 24a (citations omitted)). Thus, the Commission found "no question" regarding its authority to review the minimum bill provision under Section 4.[4]

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[4] The Commission also rejected petitioner's claim that its prior acceptance of the service agreement between petitioner

4. The court of appeals unanimously affirmed (Pet. App. 1a-15a), rejecting petitioner's claim that the Commission lacked authority to review the minimum bill provision under Section 4. The court observed that "Section 4 of the Natural Gas Act gives the Commission broad authority to scrutinize new rates filed by a gas company to insure that such rates are just and reasonable. The Commission may review a gas company's rate structure to insure that all parts of the structure—both old and new—operate together to produce just and reasonable rates. By filing the rate increase, a gas company assumes the risk of having to justify its entire rate structure, including integral provisions of that structure which the company does not propose to change" (Pet. App. 6a (citations omitted)).

The court upheld the Commission's finding that petitioner's rate increase "elevated the impact of the minimum bill," noting that the minimum bill "guarantees a large and constant source of payment for [petitioner]" and that "[t]his guaranteed payment has a major impact on [petitioner] and its rate structure" (Pet. App. 8a). The court concluded that "[t]he Commission's determination that the minimum bill is an integral aspect of [petitioner's] rate structure and therefore is subject to § 4 review is supported by substantial evidence" (*ibid.*).

The court further noted that the rate suspension order issued by the Commission "specifically provided

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and NGPCA (which contained the minimum bill provision) eliminated its authority to order a retroactive refund. The Commission stated that its "acceptance of the service agreement cannot be taken as an acceptance of the minimum bill clause as just and reasonable under section 4 of the NGA." Pet. App. 25a.

for retroactive refund" and "preserved the Commission's power to revise each integral provision of the rate structure, including the minimum bill provision, retroactively" (Pet. App. 8a). The Commission's order regarding the settlement of the issues other than the dispute over the minimum bill "in no way eliminated or limited the Commission's authority to order [a] refund" in connection with its review of the lawfulness of the minimum bill (*ibid.*). The court accordingly upheld the refund order issued by the Commission.[5]

ARGUMENT

The decision of the court below is correct and does not present a conflict with any decision of this Court or another court of appeals. Further review by this Court therefore is not warranted.

1. Petitioner does not challenge the Commission's determination that the minimum bill provision was unlawful; its sole claim is that the Commission lacked the authority to order a refund of the minimum bill charges that petitioner collected during the period following suspension of the new rates. Petitioner apparently contends that the Commission's finding that the minimum bill provision was unjust and unreasonable was an exercise of the Commission's authority under Section 5(a) and that the Commission accord-

[5] The court of appeals rejected petitioner's argument that retroactive relief was barred by the service agreement between petitioner and NGPCA (Pet. App. 8a-11a). It also held that the Commission properly concluded that the revised minimum bill provision filed by petitioner in order to comply with the Commission's decision invalidating the prior minimum bill did not satisfy the standard set out in the Commission's decision (*id.* at 11a-15a).

ingly could not utilize its Section 4(e) authority to order a refund. This argument rests upon a fundamental misunderstanding of the scope of Section 4(e).

Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), generally authorizes the Federal Energy Regulatory Commission to examine the rates charged by companies regulated under the Act. If the Commission finds that any element of a company's rate schedule is not just and reasonable, it must "determine the just and reasonable [provision] * * * and shall fix the same by order." Section 4(e), 15 U.S.C. 717c(e), applies only to new rate schedules filed by companies regulated under the Act, as to which the Commission has all the same powers as under Section 5(a),[6] plus two additional powers. First, the Commission may suspend a new rate schedule for a period of up to five months. Second, if the Commission does not act within the five-month period, the suspended rate may become effective but the Commission may "order [the] natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified" (15 U.S.C. 717c(e)). In sum, in a Section 4(e) proceeding, the Commission reviews not only the lawfulness of the *changes* effected by the new schedule but the lawfulness of the resulting *rates*, and may order a refund of whatever portion of the resulting rate is determined to be unlawful.

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[6] Section 4(e) provides that "the Commission may make such orders with reference [to the new rate schedule] as would be proper in a [Section 5(a)] proceeding initiated after it had become effective."

This Court has previously examined the relationship between Section 4(e) and Section 5(a). It stated that "[t]he basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential' " (*United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956)). The Court further observed that

> Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a newly changed rate or contract * * * the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful.

Ibid. (emphasis in original); see also *FPC* v. *Hunt*, 376 U.S. 515, 522 (1964).

The Commission's authority to review a gas company's rate, charge, or practice under Section 4(e)—and order a refund if the rate, charge, or practice is found unlawful—is thus not limited to review of the changes effected by the new schedule but includes any rate or practice that is an element of a newly changed

rate.[7] The mere fact that the company's rate filing does not alter a prior rate provision or practice does not preclude examination of the unchanged provision or practice under Section 4(e). Instead, "the Commission [may] review[] a revised rate completely to assure that all its parts—old and new—operate in tandem to insure a 'just and reasonable' result and [may] order[] refunds if the previously approved [tariff provision] operates with new provisions to produce an over-recovery." *Cities of Batavia* v. *FERC*, 672 F.2d 64, 77 (D.C. Cir. 1982); see also *Florida Gas Transmission Co.* v. *FERC*, 741 F.2d 1307, 1311 (11th Cir. 1984); *North Penn Gas Co.* v. *FERC*, 707 F.2d 763, 769 (3d Cir. 1983); *Laclede Gas Co.* v. *FERC*, 670 F.2d 38, 42 (5th Cir. 1982); cf. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962) (the policy of the Natural Gas Act is that a company that initiates a rate increase "assumes the hazards involved in that procedure,"

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[7] In addition, of course, the Commission must have suspended the new rate in order to subsequently exercise its refund authority (see 15 U.S.C. 717c(e)). Petitioner asserts that the Commission lacked authority to order a refund because "the minimum bill provision was not suspended" (Pet. 5 n.2). But the Commission's suspension order applied to the entire new rate and did not exempt the minimum bill (*Colorado Interstate Gas Co.*, 19 F.E.R.C. ¶ 61,071, at 61111 (1982)). The Commission rejected petitioner's contention (Pet. App. 20a, 24a-25a), and the court of appeals found (*id.* at 8a) that the Commission's suspension order preserved its power to revise the minimum bill provision retroactively. Petitioner provides absolutely no support for its assertion that these concurrent determinations should be rejected by this Court.

and therefore "bears the burden of establishing its rate schedule as being 'just and reasonable' ").[8]

The Commission must examine the interrelationship among all of the elements of a gas company's new rate in order to carry out its statutory responsibility to determine whether the charges to be imposed upon the company's customers are just and reasonable. The "increased rate" is not embodied solely in the elements of the rate schedule that actually are altered by the gas company. The rate necessarily embraces a variety of underlying assumptions and methodologies—some new, some unchanged from previous rate filings—that interact together to fix the payments that will be required of the gas company's customers.

Here, for example, petitioner's new rate schedule did not alter the terms of the minimum bill, but the charges that petitioner could impose under the minimum bill increased as a result of the increase in petitioner's rates. The court below therefore correctly concluded (Pet. App. 6a-8a) that the minimum bill provision was reviewable under Section 4(e) because the rate increase "elevated the impact of the minimum bill" (Pet. App. 8a). Since the minimum bill provision was reviewable under Section 4(e), the

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[8] *Cities of Batavia*, involved a Commission rate proceeding under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d, 824e, statutory provisions that are identical in all relevant respects to Sections 4 and 5 of the Natural Gas Act. This Court previously has stated that decisions involving these two statutes may be cited interchangeably. *E.g., Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

Commission plainly could exercise its authority to order a refund under that provision.[9]

Contrary to the argument now advanced by petitioner, the fact that the Commission prescribed the terms of the minimum bill provision that petitioner could lawfully impose, instead of simply invalidating the minimum bill, did not bar the Commission from exercising its authority to order retroactive relief. Indeed, this Court's decision in *FPC* v. *Tennessee Gas Transmission Co.*, *supra*, indicates that retroactive relief is completely appropriate in these circumstances. The rates filed by the company in that case were predicated on a 7% rate of return; the Commission found that only a 6⅛% return rate was justified, ordered the company to file rate schedules reflecting that return, and directed the refund of the difference. The Court found that "[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate" (371 U.S. at 153).

The courts of appeals have applied the same rule in cases in which the Commission has reviewed an unchanged rate provision under Section 4(e) and

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[9] Petitioner intimates (Pet. 2) that this Court's decision in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), restricted the scope of review under Section 4(e). But the Court simply observed (406 U.S. at 645) that the Commission reviews "tariff amendments" under Section 4(e); it did not in any way indicate that the scope of the Commission's review was limited to provisions physically contained in a gas company's rate filing.

prescribed alterations to the rate provision. They have concluded that where the entire rate was suspended pursuant to Section 4(e), the changes prescribed by the Commission may be imposed retroactively. *North Penn Gas Co.* v. *FERC*, 707 F.2d at 769; *Laclede Gas Co.* v. *FERC*, 670 F.2d at 42.

Here, as in *Tennessee Gas* and the cases decided by the courts of appeals, the Commission reviewed newly-filed rates under Section 4(e), found that a provision relating to the company's rates was unjust and unreasonable, prescribed the manner in which the provision should be reformed to satisfy the statutory standard, and ordered a refund of the charges imposed pursuant to the unlawful provision. That course of action plainly was authorized by Section 4(e).[10]

Indeed, the contrary view espoused by petitioner would mean that petitioner could retain charges imposed pursuant to the minimum bill provision even though that provision was suspended under Section 4(e) and the Commission subsequently found that charges imposed pursuant to the minimum bill were unlawful. Where a gas company is on notice that the charges that it collects are subject to refund under Section 4(e), there is no reason why the Commission should be precluded from exercising its au-

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[10] Petitioner attempts (Pet. 11 n.4) to distinguish the decisions of the courts of appeals affirming the Commission's refund authority on the ground that those decisions involve "rate levels" rather than tariff provisions. But Section 4(e) does not distinguish between rate levels and other provisions that affect the charges paid by a company's customers; it permits review of all of the relevant provisions. There is thus no reason why the Commission's authority to require refunds should turn upon that artificial distinction.

thority to order a refund of excessive charges. Indeed, the conclusion that the Commission may order a refund in these circumstances follows from this Court's statement in *United Gas Pipe Line Co.* that Section 4(e) *supplements* the Commission's Section 5(a) authority (see page 11, *supra*). On that view, the Commission may exercise its authority under the two provisions in tandem, prescribing the new minimum bill provision under Section 5(a) and ordering a refund under Section 4(e).

2. Petitioner argues that the decision below conflicts with the decisions of other courts of appeals. However, none of the decisions cited by petitioner is relevant here; all of them address the unrelated question of whether the Commission—rather than the gas company—must bear the burden of proof where the Commission directs a company to replace a provision in a newly-filed rate with a provision prescribed by the Commission.

Section 4(e) provides that "the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company"; in proceedings under Section 5(a), the party challenging the rate bears the burden of proof. Some courts of appeals have concluded that where "the Commission imposes a [rate] change not proposed by the natural gas company—including *an alteration in an unchanged part of a proposed higher rate*—it must first find that the existing provision is unjust or unreasonable" and that the Commission bears the burden of establishing this fact. *ANR Pipeline Co.* v. *FERC*, 771 F.2d 507, 514 (D.C. Cir. 1985) (emphasis in original); see also *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182, 186-187 (D.C. Cir. 1986); *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d

509, 521 & n.18, 524 (5th Cir. 1981); *Public Service Comm'n* v. *FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980), cert. denied, 454 U.S. 879 (1981).[11]

Petitioner does not argue that the Commission failed to carry its burden of proof in the present proceeding; indeed, the Commission expressly found (Pet. App. 18a) that "ample evidence" in the record affirmatively demonstrated that petitioner's minimum bill was not just and reasonable. Petitioner's theory appears to be that the Commission cannot order a refund where it bears the burden of proof because the Commission's order in that situation rests upon Section 5(a) rather than Section 4(e). But the decisions of the courts of appeals upon which petitioner relies do not hold that the Commission's refund authority is restricted in this manner; the courts' holdings are limited to the burden of proof question. These decisions therefore do not present a conflict requiring resolution by this Court.[12]

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[11] We express no view regarding the correctness of these decisions regarding the allocation of the burden of proof.

[12] The court of appeals in *Sea Robin Pipeline Co.* did state that the order at issue in that case "exceed[ed] the Commission's authority under section 5 because it mandates retroactive relief." 795 F.2d at 189 n.7; see also *id.* at 187. But that statement is clearly dictum. The court had already invalidated the Commission's order on the ground that the Commission failed to carry its burden of proof (*id.* at 187-189); there was no need to discuss whether the order also was invalid because the Commission lacked the authority to order a refund.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181493 40127

Supreme Court, U.S.
FILED
DEC 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER COLORADO INTERSTATE GAS COMPANY OPPOSING BRIEFS IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER COLORADO INTERSTATE GAS COMPANY OPPOSING BRIEFS IN OPPOSITION

ARGUMENT

This Reply Brief of Petitioner Colorado Interstate Gas Company (Petitioner) is addressed to the briefs filed, in opposition to grant of a Writ of Certiorari herein, by Respondent Federal Energy Regulatory Commission (Respondent or Commission) and by Natural Gas Pipeline Company of America (NGPCA). Both Respondent and NGPCA oppose the grant of certiorari in these proceedings, but on different grounds which disclose the fatal flaws in each of their contentions. A brief review of the basis for grant of certiorari herein shows that fact, and the defects of their position.

The Petition herein has shown the conflict that exists between the decision here under review of the United States Court of Appeals for The Tenth Circuit, and several decisions of the United States Courts of Appeals For The District of Columbia and Fifth Circuits.[1] Such conflict has been ably amplified by the Brief Amicus Curiae filed herein in support of grant of the writ. The District of Columbia and Fifth Circuit decisions have held, consistent with this Court's decisions, that only those portions of a pipeline company's tariffs which the company proposes to change may be suspended,[2] examined and possibly changed by the Respondent Commission under Section 4 of the Natural Gas Act. The unchanged portions can only be examined and possibly changed under Section 5 of the Natural Gas Act. The basic differences between action under Sections 4 and 5 are that under Section 4: (i) the Commission decision can be made effective as of the date the company made the change effective, even if such date is earlier than the date of the Commission decision; (ii) the company bears the burden of proof as to changes proposed by the company, and (iii) the suspension authorization exists. Under Section 5, the decision can only be made effective on or after the date a valid decision is final, and the burden of proof is on those advocating change in the company's tariff terms.

The above principles have been solidly established. These proceedings arise because the Respondent Commission has relatively recently been seeking to escape these basic, elemental principles, so as to try to reverse the

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[1] *Sea Robin Pipeline Co.* v. *FERC*, 795 F.2d 182 (D.C. Cir. 1986); *ANR Pipeline Company* v. *FERC*, 771 F.2d 507, 513 (D.C. Cir. 1985); *Public Commission of New York* v. *FERC*, 642 F.2d 1335 (D.C. Cir. 1980), cert. denied, 454 U.S. 879 (1981); *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d 509, 524 (5th Cir. 1981).

[2] Indeed, only as to the changes proposed is "suspension" relevant, since the function of suspension is to delay a new provision becoming effective: unchanged provisions are already effective and thus cannot be "suspended", but can be examined under Section 5.

burden of proof and make its decisions retroactive, as to *unchanged* tariff provisions. The District of Columbia and Fifth Circuit decisions cited above have reversed those efforts, but the Tenth Circuit, hereinbelow, did not; it has approved a *retroactive* Commission decision, relative to an *unchanged* provision.

1. Respondent Commission's basic effort to distinguish the District of Columbia and Fifth Circuit decisions, to try to deny the conflict of circuits, is its erroneous claim (Brief, pp. 16-17) that those cases go only to the Section 5 provision as to burden of proof, but not to the Section 5 prohibition against retroactivity. That claim is clearly false, since the applicability of Section 5, and the inapplicability of Section 4, are unitary facts. If Section 5 is applicable, and Section 4 is not, then the burden of proof standard of Section 5, and not of Section 4, applies, *and* the decision reached must be prospective and not retroactive, as Section 5 requires. A given case may involve Commission violation of one of such standards or the other, but both standards are applicable. In fact, in one of the cases which conflicts with the Tenth Circuit decision below, the Commission violated *both* of such standards, and the Court of Appeals For The District of Columbia so held.

> "In *Sea Robin*, the Commission had ordered the allocation of additional costs to, and a corresponding change in the rate level for, a transportation service the rate for which the company had not proposed to change. This allocation resulted in lower rates for other services so that refunds were required of the company." (*Sea Robin Pipeline Company* v. *FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986).

The Commission had made its order retroactive (and thus ordered refunds), and had also utilized the wrong standard for burden of proof, the Court held. The Court therefore reversed the Commission's decision, stating *inter alia*:

> "The first order also exceeds the Commission's authority under section 5 because it mandates retroactive relief. FERC ordered Sea Robin to refund to its customers, other than Gulf, any fees they had paid since June 1, 1980 in excess of the fees they would have paid under the new, Commission-directed methodology. *See Opinion No. 227-A*, 31 F.E.R.C. AT 61,382. Sea Robin had a right to rely on the legality of the filed rate once the Commission allowed it to become effective. FERC may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate's prescription." (Id, p. 189, n. 7)

The Commission's brief in opposition seeks to characterize the Court's holding as to retroactivity as dicta, but that is clearly contrary to the decision, as shown above. The Commission is simply trying to claim that the burden of proof point is the "major" holding of the Court, and then characterize the other holding(s) as "dicta", but that effort conflicts with the Court's actual holdings, and the unavoidable unitary nature of the question involved.

2. NGPCA's opposition to the Petition takes a different tack, by asserting that the Tenth Circuit decision, below, is correct. That, of course, is the question to be decided upon grant of certiorari, rather than now. As briefly noted below, Petitioner respectfully submits that such conclusion is in error: that, instead, it is the decisions of the District of Columbia and Fifth Circuits which are properly decided. But what is significant at this stage is that like the Commission, NGPCA has failed to refute the conclusion that a clear conflict among Circuit Courts of Appeals exists. And neither the Commission nor NGPCA even try to contest the fact that the questions involved herein are of great importance to the administration of the Natural Gas Act, and arise in virtually every rate case arising under that Act. Thus, the classic grounds for grant of certiorari exist here.

The fact that NGPCA, like the Commission, has failed to refute the clear existence of the conflict of Circuits is shown by the fact that in the section of its brief entitled "The Tenth Circuit Decision Is Consistent With Precedent From Other Circuits", NGPCA does not *mention even one* of the cases which have been shown by Petitioner to be in conflict with the decision below. Indeed, three of those four conflicting decisions are not mentioned anywhere in the brief. The fourth—*Sea Robin*, discussed above—is the subject of the third section of the NGPCA brief, in an effort to distinguish it. But that effort is unavailailing. First, NGPCA says that the *Sea Robin* decision states it does not overrule the same Court's prior decision in *Cities of Batavia* v. *FERC*, 672 F.2d 64 (D.C. Cir. 1982). NGPCA then tries to bootstrap on its *allegation* that *Cities of Batavia* is consistent with the Tenth Circuit decision below. In fact, however, what the District of Columbia actually held in *Sea Robin* was that the Commission's action under review there—retroactivity and erroneous burden of proof in a Section 5 case, which is what was upheld hereinbelow—was in error, *and was not* in accord with the *Cities of Batavia* case. Thus, there was no need to "overrule" *Cities of Batavia* in order to reverse the Commission. (See Section III, pp. 10-11, of the Petition herein).

3. As noted above, the major thrust of the briefs of both the Commission and NGPCA is an effort to support the decision below on the merits. If certiorari is granted herein, Petitioner will demonstrate in greater detail that it is the District of Columbia and Fifth Circuits decisions which are soundly decided, and that the efforts of the Commission to avoid its statutory restrictions, and the decision of the Tenth Circuit below affirming such result, are in error. The core of the efforts to support the decision below on the merits [3] is the Commission's claim that

[3] Both the Commission and NGPCA cite this Court's decision in *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) and argue, to quote NGPCA, that the case establishes that the Commission can act on rate design or minimum

the "minimum bill" provision of the Petitioner's tariff—which Petitioner did *not* file to change—is allegedly an "integral" part of the *level* of Petitioner's rates. Thus, the argument goes, since Petitioner did seek a change in the rate level, it allegedly "opened up" the minimum bill, too, for Section 4 procedures. The connection between minimum bill and rate level, the opponents of certiorari claim, is that if a customer is required to pay for volumes of gas, by the minimum bill provision, it will pay the rate level fixed in the proceedings. However, that argument would read the distinction between Sections 4 and 5 out of the act, since the factor of rate level "interacts" *that way* with *every* tariff provision. In fact, the two topics are separate tariff provisions, and present separate issues, and it is only the provision which the pipeline proposes to change which is subject to the Section 4 standards: all others are subject only to Section 5.

That is the clear holding of the District of Columbia and Fifth Circuits decisions which conflict with the decision below. As NGPCA says (Brief p. 11): "In *Sea Robin*, the Commission had ordered the allocation of additional costs to, and a corresponding change in the rate level for, a transportation service the rate for which the company had not proposed to change. This allocation resulted in lower rates for other services so that refunds were required of the company." (*Sea Robin Pipeline Company* v. *FERC*, 795 F.2d 182, 187 (D.C. Cir. 1986).

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bill issues under Section 4 of the Natural Gas Act "even if the pipeline itself has proposed no change in rate design but only in the overall level of rates". In fact, that is *not* the holding of *Tennessee*. In that case, the Commission decided *only* issues as to which the Company has not proposed a change. In fact, the case arose because the Commission *deferred decision* on rate design issues (which the Company had not proposed to change) and decided only the rate level issues as to which the Company had proposed changes. Thus, the case had no holding—or question—at all as to whether a decision on an issue as to which the Company had proposed no change can be rendered under Section 4 and thus be retroactive. The issue was not involved there at all, contrary to the contentions here of NGPCA and the Commission.

That passage correctly concedes that in *Sea Robin*, the Company had filed a "rate level" change, and the issue decided by the Commission—the methodology for design of rates-- meant that the new rates designed by the Commission would be higher or lower, depending upon the overall rate level decided upon. Despite this "interrelationship", the Court held that only the rate level was a Section 4 issue—since the company had proposed to change it—while the rate design was not, since the company had not proposed to change it. That was also the holding of the other three cases cited by Petitioner as in conflict with the decision below.

Examination of those decisions establishes clearly that:

a. The conflict alleged by Petitioner and Amici herein clearly does exist;

b. The issues involved in such conflict are of great importance;

c. The decisions of the District of Columbia and Fifth Circuits are soundly decided, and the decision below is not.

CONCLUSION

Petitioner respectfully urges that the Court grant the Petition and reverse the decision below.

Respectfully submitted,

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December 16, 1986

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